for Nisi Prius

A TREATISE

OF THE LAW OF

BILLS OF EXCHANGE,

PROMISSORY NOTES,

BANK-NOTES AND CHECKS.

BY

SIR JOHN BARNARD BYLES,

QUEEN'S SERJEANT,

NOW ONE OF THE JUDGES OF HER MAJESTY'S COURT OF COMMON PLEAS.

The Tenth Edition,

WITH NOTES FROM THE FIFTH AMERICAN EDITION,

BY MAURICE BARNARD BYLES, ESQ.,

OF THE INNER TEMPLE, BARRISTER-AT-LAW.

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TO

THE RIGHT HONORABLE

JAMES LORD WENSLEYDALE,

LATE ONE OF THE

BARONS OF HER MAJESTY'S COURT OF EXCHEQUER,

TO WHOM

THE LAW AND ITS PROFESSORS ARE UNDER OBLIGATIONS

AS GREAT AS TO ANY JUDGE WITHIN LEGAL MEMORY,

THIS WORK

IS,

WITH HIS PERMISSION,

AFFECTIONATELY INSCRIBED

BY

THE AUTHOR.

PREFACE

TO THE TENTH EDITION.

For the additions and alterations in this Edition the Editor alone is responsible, although every sheet has passed under the eye of the Author.

MAURICE BARNARD BYLES.

1*st January*, 1870.

5, Crown Office Row,
Inner Temple.

PREFACE

TO THE FIRST EDITION.

THERE is no vestige of the existence of bills of exchange* among the ancients, and the precise period of their introduction is somewhat controverted. It is, however, certain that

* Il n'y a aucun vestige de notre contrat de change, ni des lettres de change, dans le droit Romain. Ce n'est qu'il n'arrivât quelquefois chez les Romains, que l'on comptât pour quelqu'un une somme d'argent dans un lieu à une personne, qui se chargeoit de lui en faire compter autant dans un autre lieu. Ainsi nous voyons, dans les lettres de Cicéron à Atticus, que Cicéron voulant envoyer son fils faire ses études à Athènes, s'informe si pour épargner à son fils de porter lui-même à Athènes l'argent dont il y auroit besoin, on ne trouveroit pas quelque occasion de le compter, à Rome, à quelqu'un qui se chargeroit de le lui faire compter à Athènes.—*Epist. ad Att.* xii. 24; xv. 25. Mais cela n'étoit pas la négociation de lettres de change telle qu'elle a lieu parmi nous; cela se faisoit par de simples mandats. Cicéron chargeoit quelqu'un de ses amis de Rome qui avoit de l'argent à recevoir à Athènes, de faire tenir de l'argent à son fils à Athènes; et cet ami, pour exécuter le mandat de Cicéron, écrivoit à quelqu'un des débiteurs qu'il avoit à Athènes, et le chargeoit de compter une somme d'argent au fils de Cicéron. Au reste, on ne voit point qu'il se pratiquât chez les Romains, comme parmi nous, un commerce de lettres de change: et nous trouvons au contraire, en la loi 4, § 1, ff. *de naut. Fœn.*, qui est de Papinien, que ceux qui prêtoient de l'argent à la grosse aventure aux marchands qui trafiquoient sur mer, envoyoient un de leurs esclaves pour recevoir de leur débiteur la somme prêtée lorsqu'il seroit arrivé au port où il devoit vendre ses marchandises; ce qui certainement n'auroit pas été néces-

they were in use in the fourteenth century. Indeed, they are mentioned as "letteres d'eschange" in the English Statute Book (3 Ric. 2, c. 3), as early as the year 1379. Though we find in our English reports no decision relating to them earlier than the reign of James the First.*

It is probable that a bill of exchange was, in its original, nothing more than a letter of credit from a merchant in one country, to his debtor, a merchant in another, requesting him to pay the debt to a third person, who carried the letter, and happening to be travelling to the place where the debtor resided. It was discovered by experience, that this mode of making payments was extremely convenient to all parties:—to the creditor, for he could thus receive his debt without trouble, risk or expense—to the debtor, for the facility of payment was an equal accommodation to him, and perhaps drew after it facility of credit—to the bearer of the letter, who found himself in funds in a foreign country, without the danger and incumbrance of carrying specie. At first, per-

saire, si le commerce des lettres de change eût été en usage chez les Romains.

Quelques auteurs ont prétendu que l'usage du contrat de change et des lettres de change est venu de la Lombardie, et que les Juifs, qui y étoient établis, en ont été les inventeurs: d'autres en attribuent l'invention aux Florentins, lorsqu'ayant été chassés de leur pays par la faction de Gibelins, ils s'établirent à Lyon et en d'autres villes. *Il n'y a rien sur cela de certain, si ce n'est que les lettres de change étoient en usage dès le quatorzième siècle.* C'est ce qui paroît par une loi de Venise de ce temps sur cette matière, rapportée par Nicholas de Passeribus, en son livre, *De Script. Privat.* lib. 3.—*Pothier, Traité du Contrat de Change, Partie Prem.; Chap.* 1, *s.* 1.

* *Martin* v. *Boure*, Cro. Jac. 6.

haps, the letter contained many other things besides the order to give credit. But it was found that the original bearer might often, with advantage, transfer it to another. The letter was then disencumbered of all other matter; it was open and not sealed, and the paper on which it was written gradually shrank to the slip now in use. The assignee was, perhaps, desirous to know beforehand, whether the party, to whom it was addressed, would pay it, and sometimes showed it to him for that purpose; his promise to pay was the origin of acceptances. These letters or bills, the representatives of debts due in a foreign country, were sometimes more, sometimes less, in demand; they became, by degrees, articles of traffic; and the present complicated and abstruse practice and theory of exchange was gradually formed.

Upon their introduction into our own country, other conveniences, as great as in international transactions, were found to attend them. They offered an easy and most effectual expedient for eluding the stubborn rule of the common law, that a debt is not assignable; furnishing the assignee with an assignment binding on the original creditor, capable of being ratified by the debtor, perhaps guaranteed by a series of responsible sureties, and assignable still further, *ad infinitum*. Not only did these simple instruments transfer value from place to place, at home or abroad, and balance the accounts of distant cities without the transmission of money; not only did they assign debts in the most convenient, extensive and effectual manner; but the value

of a debt was improved by being authenticated in a bill of exchange, for it was thus reduced to a certain amount, which the debtor, having accepted, could not afterwards unsettle; evidence of the original demand was rendered unnecessary, and the bill afforded a plainer and more indisputable title to the whole debt. A creditor, too, by assigning to a man of property a bill at a long date, given him by his debtor, could obtain, for a trifling discount, his money in advance. Credit to the buyer was thus rendered consistent with ready money to the seller, and the reconciliation of the apparent inconsistency was brought about by a further benefit to a third person, for it was effected by advantageously employing the surplus and idle funds of the capitalist. At the first introduction of bills of exchange, however, the English Courts of Law regarded them with a jealous and evil eye, allowing them only between merchants; but their obvious advantages soon compelled the Judges to sanction their use by all persons; and of late years the policy of the Bench has been industriously to remove every impediment, and add all possible facilities to these wheels of the vast commercial system.

The advantages of a bill of exchange in reducing a debt to a certainty, curtailing the evidence necessary to enforce payment, and affording the means of procuring ready money by discount, often induced creditors to draw a bill for the sake of acceptance; though there might be no intention of transferring the debt. Such a transaction pointed out the way to a shorter mode of effecting the same purpose by

means of a promissory note. Promissory notes soon circulated like bills of exchange, and became as common as bills themselves. Notes for small sums, payable to bearer on demand, were found to answer most purposes of the ordinary circulating medium, and have at length, in all civilized countries, supplanted a great portion of the gold and silver previously in circulation. Great, however, as was the saving, and numerous the advantages arising from the substitution, it was discovered by experience that the dangers and inconveniences of an unlimited issue of paper money were at least as great. The Legislature have, therefore, found it necessary to place the issue of negotiable notes for small sums under the restrictions which will be pointed out in this work; and experience has proved that the only mode of preserving paper money on a level with gold, is to compel the utterers to exchange it for gold, at the option of the holder. And peradventure even then, unless the State control the issue of paper, on principles controverted and imperfectly understood at present, the value of the whole circulating medium may decline together, as compared with other commodities or the currency of foreign countries, and the consequent tendency of the precious metals to leave the kingdom may, by narrowing the basis of the currency, endanger the whole superstructure.

During the suspension of cash payments and the circulation of one pound notes, nearly every payment in this country was made in paper. And some idea may be formed of the immense amount of property now afloat in bills and

notes, when it is considered that all payments for our immense exports and imports, almost every remittance to and from every quarter of the world, nearly every payment of large amount between distant places in the kingdom, and a large proportion of payments in the same place, are made through the intervention of bills; not to mention the amount of common promissory notes, at long and short dates, the notes of the Bank of England and country banks, and the universal and daily increasing use of checks. It will not, perhaps, be an unreasonable inference that the bills and notes of all kinds, issued and circulated in the United Kingdom in the space of a single year, amount to many hundred millions.

Simple as the form of a bill or note may appear, the rights and liabilities of the different parties to those instruments have given rise to an infinity of legal questions, and multitudes of decisions—a striking proof of what the experience of all ages had already made abundantly manifest,—that law is, in its own nature, necessarily voluminous; that its complexity and bulk constitute the price that must be paid for the reign of certainty, order, and uniformity; and that any attempt to regulate multiform combinations of circumstances, by a few general rules, however skilfully constructed, must be abortive.

In France this subject has been briefly but luminously treated, first by Dupuy de la Serra, in a little book entitled "*L'Art des Lettres de Change*," and afterwards by Pothier,

whose work, as well as his other performances, and in particular the *Traité des Obligations*, evinces a profound acquaintance with the principles of jurisprudence, and extraordinary acumen and sagacity in their application; the result of the laborious exercise of his talents on the Roman law. There cannot be a greater proof of the surpassing merit of his works, than that, after the lapse of more than half a century, and a stupendous revolution in all the institutions of his country, many parts of his writings have been incorporated, word for word, in the new Code of France. The *Traité du Contrat de Change* is often cited in the English Courts of Law. "The authority of Pothier," says the present learned Chief Justice * of the Common Pleas, "is as high as can be had, next to the decision of a Court of Justice in this country; his writings are considered by Sir William Jones as equal, in point of luminous method, apposite examples, and a clear manly style, to the works of Littleton on the Laws of England." †

In this country, the growth of the law on bills and notes has been almost proportionate to the increase of those instruments; insomuch that within the last sixty years the reported decisions upon them, in law, equity, and bankruptcy, would fill many volumes. Numerous have been the attempts to

* Lord Chief Justice Best.

† *Cox* v. *Troy*, 5 B. & A. 481. There is now also an able modern French work on the same subject by M. Noguier. In America have recently appeared the Commentaries of Mr. Justice Story on the Law of Bills of Exchange, and his Commentaries on the Law of Promissory Notes.

reduce the mass of authorities to the shape of a regular treatise; but amongst all these, two only are now in common use in the Profession, the treatise of Mr. Chitty, and the summary of Mr. Justice Bayley.*

The work of the learned Judge is written with the greatest circumspection; but it is now out of print, and the latest edition some years old.†

Mr. Chitty's treatise is a laborious and full collection of almost all the cases, by an eminent counsel, the extent of whose legal acquirements, and the readiness of their application, can only be appreciated by those who have been in the habit of personal intercourse with him. But the size of the book is an objection with many, and a cloud of authorities will sometimes obscure the most luminous arrangement.

This little work does not aspire to compete with either of the above learned performances, but merely to supply a want, felt by many, of a plain and brief summary of the principal practical points relating to bills and notes, supported by a reference to the leading or latest authorities. In many cases the reader will, however, find the law laid down in the very words of the judgment, a plan which the Author has been induced to adopt, partly that those who may not have ready access to the authorities may be satisfied that the law is cor-

* Mr. Roscoe's Digest and Mr. Johnson's book had not appeared when these observations were written.

† A new edition has since been published.

rectly stated; and partly because he distrusted his own ability to enunciate, on so complicated a subject, a general rule, neither too narrow nor too wide, beset, as almost all such general rules now are, with numerous qualifications and exceptions. No pains have been spared to render the subject intelligible. How far the book is likely to be useful in practice, it is for others to determine.

JOHN BARNARD BYLES.

INNER TEMPLE,
16*th April*, 1829.

CONTENTS.

Chapter I.

GENERAL OBSERVATIONS ON A BILL OF EXCHANGE.

	PAGE
Explanation of Terms	1
Peculiar Qualities of Contracts on Bills or Notes	2
Effect of drawing or indorsing a Bill	2
How far Bills and Notes are considered as Chattels	3
May be taken in execution	3
Where a Bill or Note may operate as a Will or Testamentary Instrument	4
As a declaration of Trust	4

Chapter II.

OF A PROMISSORY NOTE.

What it is	5
How considered at Common Law and what by Statute	5
Promissory Notes made out of England	6
Form of a Note	6
Note by a man to himself	6
Note by a man to himself and another	7
Notes payable by instalments	7
Joint and several Notes	7
Where there is principal and surety	8
Contribution between joint makers	8
Bank Notes	9
Bank of England Notes	9
When Bank of England Notes are a legal tender	10
Country Bank Notes	10
When Country Bank Notes are a legal tender	10
When Money had and received will lie for them	10
Of the contracting words in a Promissory Note	10
Other matters contained in a Note	12

Chapter III.

OF A CHECK ON A BANKER.

	PAGE
What instruments are checks	13
Requisites to bring checks within the exemption of the General Stamp Act	14
Effect and penalty of omitting a stamp on check, where necessary	16
Alteration of the law by recent Acts	16
Amount for which a check may be drawn	17
How transferred	18
Banker's obligation to pay	18
Time of presentment	19
As between Holder and Drawer	19
As between the Holder and his own Banker	20
Where the parties do not live in the same place	20
As between the Holder and a Transferer who is not a Drawer	20
What amounts to an engagement to pay a check	21
Crossed checks	21
Statute relating to crossed checks	22
What a check is evidence of	23
When it amounts to Payment	23
When it may be taken in Payment	24
Whether Holder be Assignee of a chose in action	24
Effect of Drawer's death	24
Of Fraud in filling up checks	24
Branch Banks	25
When several must join in drawing check	25
From what period Customers debited	25
Checks not protestable	25
Formerly referred to Master to compute	26
Right to cash a check	26
Overdue check	26
Is within Bills of Exchange Acts.	26
May be taken in execution	26
Checks payable to order	26

Chapter IV.

OF AN I O U.

	PAGE
What it is	28
Requires no stamp	28
Unless it amounts to a Note or Agreement	29
Need not be addressed to the Creditor	29
Bill in Equity to discover Consideration	29
To restrain an Action	29

Chapter V.

OF THE CAPACITY OF CONTRACTING PARTIES TO A BILL OR NOTE.

	PAGE
Agents	31
Who may be an Agent.	31
Special Agent and General Agent	31
Actual and ostensible Authority	31
How Agent appointed	31
Procuration	33

PAGE

When Authority inferred . 33
To indorse 33
When admitted . . . 33
Consequences of an Agent exceeding his Authority . 34
Unauthorized indorsement . 34
Delivery 34
Pledging 34
Bill brokers 35
When the Production of Agent's Authority may be required 35
How determined . . . 36
When it may be delegated . 36
Personal liability of an Agent to third Persons . . 36
Parol evidence inadmissible to discharge the Agent . . 37
Signature without Authority . 38
Liability how avoided . . 38
Liability of Agent for Fraud . 38
Rights of an Agent against third Persons . . . 38
Liability of an Agent to his Principal 40
Rights of Principal against third Persons . . . 40
PARTNERS 40
PARTNERSHIP, BOTH ACTUAL AND OSTENSIBLE . . 41
Agreement, *inter se*, not to draw Bills . . . 41
Cases in which Partners are both entitled and liable in respect of a Bill . . 41
Rights and Liabilities as between the Firm and the World 43
One Partner binding the others by Bills 43
By Promissory Notes . . 44
Must observe style of Firm . 44
Farming and Mining Partnerships 45
Partnerships not in Trade . 45
Creditors carrying on a Trade 45
Consequences of Partner exceeding his Authority . 45
Where there is Notice . . 46

PAGE

Common Partner in two Firms of the same Name . . 48
New Partner . . . 48
Fresh Security . . . 48
DORMANT OR SECRET PARTNER 49
His Liability . . . 49
NOMINAL PARTNER . . 50
DISSOLUTION . . . 50
Retirement of Secret Partner . 52
OCCASIONAL PARTNERSHIPS 53
EXECUTORS AND ADMINISTRATORS 53
Their Rights and Duties . 54
Effect of Probate . . . 54
Debtor made Executor . . 54
Debtor becoming Administrator 56
When Executors may sue as such 56
Delivery after Indorser's death 57
Indorsement by one Executor of several 57
Personal Liability on a Bill . 57
Joinder of common Counts in Actions against . . . 57
INFANTS 58
LUNATICS 61
Persons under undue influence 62
PERSONS DRUNK . . 62
MARRIED WOMEN . . 63
CONVICTED FELONS . . 67
ALIENS 67
CORPORATIONS AND BANKING COMPANIES . . 67
Bank of England . . . 68
Banks of not more than six Partners 69
Banks of more than six Partners 70
JOINT STOCK COMPANIES . 71
At Common Law . . . 71
Joint Stock Companies under 7 & 8 Vict. c. 110 . . 72
Joint Stock Companies under subsequent Acts . . 72
PERSONS ACTING IN AN OFFICIAL CAPACITY . . 73
LOAN SOCIETIES . . . 74

Chapter VI.

OF THE FORM OF BILLS OF EXCHANGE AND PROMISSORY NOTES.

	PAGE
On what substance they may be written	75
In what language	75
In pencil or in ink	75
Signature by a mark	76
Of the Superscription of the Place where made	76
Of the Date	76
Of the Superscription of the Sum payable	77
Of the Time when payable	78
Of Usance	78
Of the request to pay	79
Of the name of the Payee	79
Of the words "Order" or "Bearer"	82
Of the Sum payable	82
Bills and Notes under 20*s.*	83
Bills and Notes under 5*l.*	83
Of the words "Value Received"	84
Other Statement of the consideration	85
Of the Drawer's Signature	85
Of the Direction of the Drawee	86
Of the Place where made Payable by the Drawer	87
Of the Direction to place to Account	88
Of the words "As per Advice"	88

Chapter VII.

OF AMBIGUOUS, CONDITIONAL, AND OTHERWISE IRREGULAR INSTRUMENTS.

Note payable to the Maker	89
Equivocal Instruments	89
Bills and Notes must be for payment of a sum of money and for that only	91
And for money in specie	91
And for a sum certain	92
And for payment of it	92
Must not suspend payment on a condition	92
Period of payment may be uncertain if inevitable	94
Where several makers or several Payees are respectively liable or entitled in the alternative	94
Must not be made payable out of a particular fund	95
Irregular Bill or Note may be an agreement	95
Letters of Credit and Circular Notes	95

Chapter VIII.

OF AGREEMENTS INTENDED TO CONTROL THE OPERATION OF BILLS OR NOTES.

Various sorts of agreements	97
Effect of contemporaneous agreement written on the Instrument	97
Effect of an agreement subsequently written on the Instrument	98
Effect of agreement written on a distinct paper	98

PAGE
Agreement contemporaneous but collateral . . . 98
Effect of an oral agreement . 99
Delivery in the nature of an escrow . . . 99
Agreement to renew . 100
Agreement on Bill must be read 100
Pleading an agreement . 100

CHAPTER IX.

OF THE STAMP.

When Stamps were first imposed on Bills or Notes . 101
Adhesive Stamps . . 110
On Foreign Bills . . 110
What regulations of former Stamp Acts are still in force 111
In what cases a Bill or Note may be restamped . 111
Effect of alteration of the Law 112
What Bills or Notes are exempt from Stamps . . 112
Stamps on Foreign Bills and Notes 112
Penalty on unstamped Instruments . . . 112
What Notes may be reissued 112
Stamps on Foreign Bills . 110
Stamps on Irish or Colonial Bills 113
What is such a making within the Kingdom as to subject to a Stamp . . . 113
Effect of want of a Stamp on the Instrument . . 113
Fresh Dies 115
Effect of post stamping against Law . . . 115
Reservation of Interest does not make a larger Stamp necessary . . . 116
Nor post dating . . . 116
On Instruments which are in Law but Agreements . 116
Sufficiency of Stamp admitted by paying money into Court 116
When the objection to the Stamp should be taken . 116
Pleading 117

CHAPTER X.

OF THE CONSIDERATION.

Presumption as to considerations on Bills and Notes . 118
When it must be proved . 119
In the case of an Accommodation Bill . . . 119
Effect of New Rules of Pleading 121
Ambiguity of the expression "*bonâ fide* holder for value" 121
Distinction between holder without value and holder with notice . . . 121
Burthen of proof in the case of alleged holder without value 122
In case of alleged holder with notice 122
Proof of notice . . . 123
Plaintiff standing on prior title 123
What amounts to notice . 123
Explicit notice . . . 123
Implicit notice . . . 123
Abstinence from Inquiry . 123

	PAGE
Gross negligence not equivalent to notice	124
Notice to an Agent	124
Gift of a Bill or Note	124
Nature of the Consideration	125
Pre-existing Debt	125
Fluctuating Balance	126
Debt of a third Person	126
A Judgment Debt	127
Compromise of a Claim	127
Moral Obligation	127
Cases where more than one Consideration comes in question	128
Failure of Consideration	129
Notice of absence of Consideration	129
Accommodation Bill	129
Partial absence or failure of Consideraton	130
FRAUD	131
Bills and Notes in Fraud of third Persons	132
Where a Party who has been defrauded must pay a Bill or Note, signed by him, without Consideration	134
ILLEGAL CONSIDERATIONS AT COMMON LAW	135
Immoral	135
In contravention of Public Policy	136
ILLEGAL OR VOID BY STATUTE	138
Usury	138
Gaming	138
Horse-racing	139
Innocent Indorsee	139
New Security	140
Stock-jobbing	140
Other Considerations illegal by Statute	142
Notice of fraudulent or illegal Consideration	144
Illegality of Consideration where Judgment recovered	144
Part Consideration	144
Renewal of Bill given on illegal Consideration	144

CHAPTER XI.

OF THE TRANSFER OF BILLS AND NOTES.

Division of the Subject	147
WHAT BILLS TRANSFERABLE	147
Effect of Indorsement of a Bill not negotiable	147
Of a Note not negotiable	148
Subsequent insertion of words creating negotiability	148
MODES OF TRANSFER	148
Blank Indorsement	149
Special Indorsement	149
On the face of Bill	150
An Allonge	150
Misspelt Indorsement	150
By a plurality of holders	150
Conversion of blank into special Indorsement	150
Delivery necessary	151
LIABILITY OF INDORSER	151
How declined	152
By Indorsement sans recours	152
By Agreement	152
By converting blank into special Indorsement	153
May be suspended on a Condition	153
What Indorsement admits	153
Striking out Indorsements	154
RIGHTS OF INDORSEE	154
Of Transferee to compel Indorsement	155
Where a Bill is re-indorsed to a prior Indorser	155
Where the Indorser is a Trustee	156
Restrictive Indorsements	157
LIABILITY OF PERSONS TRANSFERRING BY DELIVERY	159
No Liability on the Instrument	159

PAGE

Nor in general on the Consideration . . . 159
Where the Bill is considered as sold 159
Unless Bill or Note given for pre-existing Debt . . 161
Other exceptions to the general rule . . . 161
Sale to an Agent of a foreign Principal . . . 162
Warranty of Genuineness . 162
No Liability to subsequent Transferee . . . 162
Effect of Fraud . . . 163
RIGHTS OF TRANSFEREE BY DELIVERY . . 163
Former effect of Negligence in the Transferee . . 163
Present effect of Negligence or Fraud . . . 164
Title of an Agent . . 164
Pledging Bills payable to Bearer 164
Other Instruments payable to Bearer . . . 164
Metallic Tokens . . . 165
TRANSFER UNDER PECULIAR CIRCUMSTANCES . 165
Before Bill filled up . . 165
After Refusal to accept . 166
Where the Transferee has no notice 166
After due 167
Transfer of overdue Check . 169
Of Note payable on Demand 169
Pleading 170

PAGE

Equitable Relief in case of outstanding overdue Bill . 170
Burthen of Proof . . 170
Check drawn on Bearer's Banker 170
After abandonment of right. 170
After Payment . . . 170
By other Parties . . . 171
After premature Payment . 172
After partial Payment. . 172
Where there is a Question whether the Bill was paid or transferred . . . 172
Transfer to Acceptor . . 172
Transfer for part of the Sum due 172
For Residue unpaid . . 173
After Release . . . 173
After Action brought . . 173
Transfer abroad . . . 173
After Holder's Death . . 174
After Bankruptcy . . 174
After Marriage . . . 174
By Deposit with a Banker . 174
By Will 175
Donatio Mortis Causâ . . 175
How it resembles a Legacy . 177
How it differs from a Legacy 177
Execution 177
Larceny 178
Embezzlement . . . 178
Effect of a Transfer in removing Technical difficulties in suing . . . 178
WHEN A COURT OF EQUITY WILL RESTRAIN NEGOTIATION 179

CHAPTER XII.

OF THE PRESENTMENT FOR ACCEPTANCE.

Advisable in all cases . . 180
Necessary where Bill is drawn at or after sight . . 180
When to be made . . 180
At what hour . . . 182
Excused by putting Bill into circulation . . . 182
Or by other reasonable Cause
To whom it should be made. 183

What time may be given to the Drawee . . . 183
Consequence of Negligence in Party presenting . . 183
Proper Course for Holder when Drawee cannot be found, or is dead . . 183
PLEADING 183

CHAPTER XIII.

OF ACCEPTANCE.

	PAGE
Meaning of the Word	184
Liability of Drawee before Acceptance	184
A Draft dispensing with Acceptance	185
Liability of a Banker at whose Bank a Bill is made payable by the Acceptor	185
Liability to the Customer	185
Liability of the Banker to a Holder	185
By whom it may be given	186
Not by a series of Acceptors	186
WHEN	187
Before Bill filled up	187
Not before Bill in existence	188
After due, or after prior refusal to accept	189
Presumption as to time of Acceptance	189
Acceptance of Inland Bills must be in writing on the Bill	189
What will amount to an Acceptance in Writing on the Bill	189
What will amount to an Acceptance of Foreign Bill	190
A Promise to pay	190
To whom it may be made	190
Is irrevocable	191
What else amounts to Acceptance of a Foreign Bill	191
What engagement Holder may require of Acceptor	192
What should be his conduct in case of qualified Acceptance	192
Qualified Acceptance	193
Conditional Acceptance	193
Partial or Varying Acceptance	194
Payable at particular place	194
Presentment for payment there	195
Effect of two Acceptances on the same Bill	195
Delivery or Notice necessary to complete Acceptance	195
Cancellation of Acceptance by Drawee	195
By Banker	196
By other Parties	196
Liability of Acceptor	196
How discharged	196
By Waiver	196
Cancellation by the Holder	198
Security by Specialty	198
Pleading	199
What Acceptance admits	199
Where Drawee precluded from disputing Acceptance	200

CHAPTER XIV.

OF PRESENTMENT FOR PAYMENT.

	PAGE
How made	201
In case of Bankruptcy or Insolvency	202
Unnecessary to charge a Guarantor	203
Where Drawee absconds	203
In case of Drawee's Death	203
Of Holder's Death	203
When to be made	203
Time, how computed	203
Months	204
Days	204
Bills and Notes at sight	204
Usance	204
Old and New Style	205
Days of Grace	205
What in different Countries	205
How reckoned	206
Sundays and Holidays, how reckoned	206
Presentment before expiration of Days of Grace	206

PAGE
On what Instruments Days of Grace allowed . . . 206
When Presentment of Bill payable at sight is to be made 207
Of a bill payable after sight 207
Of a bill of Exchange payable on Demand . . 207
General Rule . . . 208
Different sorts of Instruments payable on Demand . 208
Of a common Bill of Exchange payable on Demand 209
Of a Check 209
Of a common Promissory Note payable on Demand. 209
Of a Bank Note . . . 209
Of other Bankers' Paper . 210
When no time of Payment is specified 210
At what Hour . . . 210
Where, when a Bill is made payable at a particular place 211
PAGE
In an action against Indorser 212
Pleading 213
When a Note is made so payable 214
Supplementary Memorandum 214
Consequence of not duly Presenting 215
Presentment not necessary to charge Acceptor . . 215
WHEN NEGLECT TO PRESENT EXCUSED . . 215
Of Bill seized under extent . 215
By circulating . . . 215
By the absconding of the Drawee 216
By Absence of Effects in the Drawee's hands . . 216
Not by declaration of Acceptor that he will not pay 216
By returning Notes . . 216
Advantage from Neglect how waived 216
Pleading 217
Evidence of Presentment . 217

CHAPTER XV.

OF PAYMENT.

TO WHOM IT SHOULD BE MADE 218
To a wrongful Holder of Instruments payable to Bearer 219
Of Instruments not payable to Bearer . . . 220
Effect of Payment by Acceptor 220
By Drawer . . . 220
Meaning of the word "RETIRE" 222
By a Stranger . . . 222
By one, who is both Agent for the Acceptor and also Indorser 222
When to be made . . 222
At what Time of Day . . 222
Subsequent Tender . . 223
Premature Payment . . 223
After Action brought . . 224
Payment by Bankers' Notes or Checks . . . 224
What amounts to Payment . 224
Legacy 224
Appropriation of Payments . 225
Rateable Appropriation . 227
Part Payment . . . 227
When Payment will be presumed 228
Evidence of Payment . . 228
Of Delivering up the Bill . 228
Of giving a Receipt . . 229
Effect of Receipt . . 229
Tender of part Payment . 229
Plea of Payment . . . 229
Retractation of Payment . 230
Payment under mistake of fact or law . . . 230
When complete . . . 230

Chapter XVI.

OF SATISFACTION, EXTINGUISHMENT, AND SUSPENSION.

	PAGE
Satisfaction	231
Not necessary before Breach	231
Its Requisites	232
Payment of a smaller Sum by third Party	232
Engagement by third Party	233
Relinquishing a Suit	233
When a Bill operates as Satisfaction	233
Extinguishment	234
Effect of Warrant of Attorney	234
Of transfer to an Acceptor	234
Of Judgment	234
Of Execution	234
Of Discharge from Execution	234
Of waiving a *Fieri Facias*	235
Of taking a Deed	235
Suspension	236
Effect of Renewal	235
Of Debtor becoming Administrator	236
Of Covenant not to sue within a limited Time	236

Chapter XVII.

OF RELEASE.

What it is	237
Release at Maturity	237
Premature Release	237
By a Party who is not the Holder	237
To Drawee before Acceptance	238
By or to one of several jointly entitled or liable	238
Restrained by a Recital	238
Covenant not to sue	238
Covenant not to sue for a limited Time	238
Appointment of Debtor Executor	239
Right to hold Securities for released Debt	239

Chapter XVIII.

OF THE LAW OF PRINCIPAL AND SURETY, IN ITS APPLICATON TO BILLS AND NOTES.

General Principles of the Law	240
Division of the Subject	241
What Parties to a Bill are Principals, and what Parties are Sureties.	242
On Accommodation Bills	243
On Promissory Notes	243
On a Joint and Several Note	244
What Conduct of the Creditor does or does not Discharge the Surety	244
Receipt of Payment	246
Release	246
Covenant not to sue	246
Release in Law	247
Agreement not to sue	247
Renewing a Bill	247
Misusing Securities	247
Discharge from Execution	247
Part Payment	248
Offer to give Time	248
Cognovit, or Warrant of Attorney	248
Judgment	249

PAGE

Bankruptcy . . . 249
Insolvency 249
Compounding . . . 249
Collateral Security . . 249
Warrant of Attorney . . 250
Discharge of prior Parties by giving Time to Drawee who has not accepted . 250
How the Discharge of the Surety may be prevented . . . 251
How it is waived . . 252
What Conduct of the Creditor towards the Surety will discharge the Principal . . 252
Rights of Sureties . 252
Surety's Right to Indemnity 252
Of Contribution between Co-Sureties 253
Action for Contribution between Co-Sureties . . 253
Determination of Contract . 254

Chapter XIX.

OF PROTEST AND NOTING.

Protest necessary on Foreign Bills, and why . . 255
By whom to be made . . 256
Office of a Notary . . 256
When to be made . . 256
Where to be made . . 256
Form of Protest . . . 257
Stamp on Protest . . 257
Protest for better Security . 257
Noting, what . . . 257
Notice of Protest . . 258
Copy of Protest . . . 258
When Protest excused . 259
Protest of Inland Bills and Notes 259
Protest of lost Bill . . 260
Pleading 260
Evidence 260
Effect of a Promise to pay . 260

Chapter XX.

OF ACCEPTANCE SUPRA PROTEST, OR FOR HONOUR.

Mode of such Acceptance . 261
Who may so accept . . 262
Conduct which Holder should pursue 262
Liability of Acceptor *supra Protest* 263
What Acceptance *supra Protest* admits . . 264
Rights of Acceptor *supra Protest* 265

Chapter XXI.

OF PAYMENT SUPRA PROTEST, OR FOR HONOUR.

What, and how made . . 266
Right of Party paying *supra Protest* 266
Notice of Dishonour by . 267
Cannot revive Liability . 267
Payment without Protest . 267
Safest mode of taking up a Bill for Honour . . 267
Accommodation Bills . . 267
When the Protest should be made 268
No Payment *supra Protest* of Promissory Notes . 268

CHAPTER XXII.

OF NOTICE OF DISHONOUR.

	PAGE
DIVISION OF THE SUBJECT	270
FORM OF THE NOTICE	270
Description of the Instrument	275
Statement of the Party on whose behalf Notice is given	275
Notice of Protest	276
MODE OF TRANSMITTING IT	276
By Post	276
Direction of the Letter	276
Evidence of Notice by Post	277
Special Messenger	277
How to be sent in case of Foreign Bill	278
AT WHAT PLACE	278
WHEN TO BE GIVEN	279
If the Parties live in different Places	280
In the same Place	281
When a Person receiving Notice should transmit it	281
May be given on the Day of Dishonour	282
When, if the Bill is deposited with Banker, Attorney or Agent	282
Notice through Branch Banks	283
Sundays and Holidays, how reckoned	283
Burden of Proof	283
BY WHOM NOTICE SHOULD BE GIVEN	284
By an Agent	285
By a Pledgee	285
TO WHOM	286
To an Agent or Attorney	288
To a Bankrupt	288
Where the Party is Dead	288
Need not be given to Acceptor	288
To Parties jointly liable	289
To a Transferer not indorsing	289
When to a Guarantor	290
To an Indorser giving a Bond	291
CONSEQUENCES OF NEGLECT	291
WHAT EXCUSES NOTICE	292
Agreement of the Parties	292
Countermand of Payment	292
No Effects	292
Where there is Reasonable Expectation that the Bill will be honoured	294
Ignorance of Party's Residence	296
Accident	297
Where a Bill is drawn by several on one of themselves	297
Death, Bankruptcy or Insolvency will not excuse	297
Insufficient Stamp	298
Note not Negotiable	298
CONSEQUENCES OF NEGLECT, HOW WAIVED	298
Laches not imputable to the Crown	300
Pleading where Notice is excused or waived	300
Evidence of Notice	300

CHAPTER XXIII.

OF INTEREST.

The Nature of Interest	302
From what Time it runs when Payable by the Terms of the Instrument	303
From what Time it runs when not made Payable by the Terms of the Instrument	303
From what Time it runs as against an Indorser	304
To what Period it is computed	304

PAGE

When Money is paid into Court 304
In Trover 305
After a Tender . . . 305
How Bankers should charge it on Checks . . . 305
Recovery of Interest after receipt of the Principal . 305
When Interest is not recoverable 305
When an Engagement to give a Bill will create a Liability to Interest . 305
Liability of a Guaranteeing Party to Interest . . 305
How Interest is recovered . 306
The Rate of Interest . . 306
Indebitatus Count . . 306
USURY 306
At Common Law . . 307
Statutes against it . . 307
Their Construction . 307
Substance of Enactments . 307
There must be a Loan . 308
Usury on Discounts . . 308
Usurious Security for Good Debt 309
Where the Charge is not for the Loan but for the Labour 310
There must be a Corrupt Intention 311
Hazard of the Principal Money 311
Advance of Goods . . 312
Irish, Colonial or Foreign Interest 312
Substituted Security . . 313
Separate Instruments . . 314
Innocent Indorsee . . 314
Statutes exempting certain Bills and Notes from the Usury Laws . . . 314
Total Repeal of the Usury Laws 316
Pleading 316

CHAPTER XXIV.

OF THE ALTERATION OF A BILL OR NOTE.

Effect of alteration at Common Law . . . 317
Of Deeds 317
Of Bills and Notes . . 318
UNDER THE STAMP ACTS . 319
Where an alteration will not vitiate 319
Before Bill issued . . 320
In Correction of a Mistake . 321
When the alteration of the Instrument extinguishes the Debt 321
Renewal of altered Bill . 322
When alteration need not be pleaded 322
When it must be pleaded . 323
Requisites of Plea . . 323
BURTHEN OF PROOF . . 323

CHAPTER XXV.

OF THE FORGERY OF BILLS AND NOTES.

Definition of the Crime . 325
Existing Statutes . . 325
Forgery of Void Bills . . 326
Of Invalid and Informal Bills 326
Forgery by Misapplication of a Genuine Signature . 326
Misapplication of his own Signature by the Party signing 327
By Signature of a fictitious Name 327
By Fraudulent Signature of a Man's own Name . . 328
Uttering a Genuine Signature, and Personating the Party signing . . . 328
Misrepresentation of Authority 329

	PAGE
Alteration	329
Uttering	329
Procuring to utter	330
Statement of the Instrument in the Indictment	330
Where several make distinct Parts of the Instrument	330
The party whose name is Forged a Competent Witness	330
Forgery of Foreign Bills	331
Evidence in Criminal Cases	331
Civil Consequences of Forgery	331
When the Payment of a Forged Bill is good	332
When Money paid in Discharge of a Forged Bill may or may not be recovered back	332
Inspection of a Bill supposed to be Forged	335

Chapter XXVI.

OF THE STATUTE OF LIMITATIONS IN ITS APPLICATION TO BILLS AND NOTES.

Policy of the Law	336
When Introduced	336
The present Statute	336
Division of the Subject	336
General Operation of the Statute	338
Does not destroy the Debt	338
Foreign Statute of Limitations	339
What Legal Proceedings it Limits	339
Merchants' Accounts	339
Effect of Statute on Title of a Subsequent Transferee	339
When it begins to run	340
On Bill payable after Date	340
Payable on a Contingency	340
Payable by Instalments	340
Against an Administrator	340
On a Bill at or after Sight	340
Bill payable on Demand	341
After Demand	341
In case of Fraud	342
In the case of an Accommodation Bill	342
When there has been both Non-acceptance and Non-payment	342
Up to what Period the Time of Limitation is Computed	342
Death of Parties after Action	343
How the Operation of the Statute is obviated by issuing a Writ	343
The Saving Clause	344
Infants	344
Imprisonment	344
Plaintiff's Absence beyond Seas	344
Defendant's Absence beyond Seas	345
Successive Disabilities	345
What Acknowledgments will take a Debt out of the Statute	346
Lord Tenterden's Act	346
Division of the Subject	346
Of what sort the Acknowledgment must be	346
Evidence of Date	348
Construction	348
Mutual running Account	348
Devise	348
Acknowledgment by Executors	349
Notice in Newspapers	349
Part Payment	349
Appropriation of Payments	340
Payment by Bill	350
Payment by Goods	350
Stamp on Acknowledgment	350
Statement of Account	350
Payment of Interest	350

PAGE

When Acknowledgment must be made 351
Payment of Money into Court 351
By whom Acknowledgment must be made . . . 351
To whom 354
What Evidence is required of the Acknowledgment . 355
How the Statute is to be taken advantage of . 356
Form of the Plea . . 356
Replication of the Statute . 357
Replication to a Plea of the Statute 357
When, independently of the Statute, Lapse of Time is a Bar . . 357

Chapter XXVII.

OF THE LAW OF SET-OFF AND MUTUAL CREDIT IN RELATION TO BILLS AND NOTES.

Nature of Set-off . . 359
Unknown to the Common Law 360
Recognized in Equity . . 360
Introduced by Statute . . 360
Division of the Subject . 361
The General Statutes of Set-off . . . 361
The Sums to be set off must be Debts 361
Legal Debts . . . 361
Subsisting Debts . . . 362
Actually due . . . 362
And at Time of Trial . . 362
Mutual 362
Statutes Permissive, not Imperative 363
Pleading 364
Set-off in Bankruptcy . 364
When the mutual Credit must have existed . . 364
Fraudulent Set-off . . 365
Attempt to deprive of Set-off. 366
What mutual Credit is . 366
Need not be of Money. . 366
The Debts need not be due . 366
Mutual Credit need not be intended 367
Breach of Trust . . . 367
Does not extinguish a Lien . 367
How mutual Credit is to be taken advantage of . . 368
Mutual Credit under Companies Act . . . 368
Set-off in Equity . . 368
Of Cases where a Stipulation, not the subject of a Set-off, is a bar to the Action 369

Chapter XXVIII.

OF A LOST BILL OR NOTE.

Title of the Finder . . 370
Proper course for the Loser to take 370
Notice of Loss . . . 371
Presentment and Notice of Dishonour of a Lost Bill . 372
Bill in the hands of an adverse Party . . . 372
Whether an Action lies on a Destroyed Bill . . 372
Will not lie on a Lost Bill . 373
Unless not Negotiable . . 374
Pleading 374
Loss after Action brought . 374
Loss of Half Note . . 375
Trover for Lost Bill . . 375
Remedy for Loser in Equity. 375
At Law 376
New Statutable Jurisdiction of Courts of Law . . 377
On whom the Loss of a Bill transmitted by Post, &c. will fall 377

Chapter XXIX.

HOW FAR A BILL OR NOTE IS CONSIDERED AS PAYMENT.

	PAGE		PAGE
Suspends the Remedy on a Simple Contract	378	What a Creditor who has been paid by a Dishonoured Bill must prove	382
Bill given as Collateral Security	379	Where the Transferer knew the Instrument to be of no Value	382
Form of Pleading	379	A Lost or Destroyed Bill, when Payment	382
But not on a Contract under Seal	380	Payment by Bank Notes or Bill or Notes payable to Bearer	382
Does not suspend Distress	380	Where a Bill is renewed	383
Payment of Attorney	380	Taking a Bill determines a Lien	383
Consequence of a Creditor taking Bills of a Third Person	380	But not on Land	384
Of the Creditor's Agent taking the Debtor's Bill	381	Is earnest	384

Chapter XXX.

OF SETS, PARTS, AND COPIES OF BILLS.

What a Bill drawn in parts is	385	Effect of omitting to refer to the other parts	386
The whole set but one Bill	386	Liability of Drawee	387
To whom the Bill belongs when the parts are in different hands	386	Liability of Indorser	387
How many parts required	386	Copies of Bills	387
		Substitutions	388

Chapter XXXI.

OF FOREIGN BILLS AND NOTES.

What are Foreign and what Inland Bills	389	Stamp on an Inland Bill purporting to be a Foreign one	390
Statute 19 & 20 Vict.	389	Sets of Bills	390
		Presentment of Foreign Bills	390
Presumption of being an Inland Bill	390	Acceptance of Foreign Bills	390
		Protest	390

Chapter XXXII.

OF THE EFFECT OF FOREIGN LAW RELATING TO BILLS OF EXCHANGE AND PROMISSORY NOTES.

	PAGE
Of the Conflict of the Laws of different Countries relating to Bills	391
Elements of the question	392
Discrepancy between Foreign Writers	392
General Principles of the English Law	392
Five Principal Rules	393
Cases where the Lex Loci Contractus governs	394
Foreign Acceptance	394
Foreign Indorsement of Foreign Note	394
Foreign Discharge	394
Cases in which Lex Loci Solutionis governs	395
Foreign Indorsement of English Note	395
Time of Payment	395
Protest and Notice of Dishonour	395
Acceptance	396
Rate of Interest	396
Immoral, Illegal, and Injurious Contracts	396
Revenue Laws of other Countries disregarded	397
Stamps on Foreign Bills	397
On Irish or Colonial Bills	397
Raising objection to Stamp	398
What is such a making within the Kingdom as to subject to a Stamp	398
Presumption that Bill was drawn abroad	398
Application of the Lex Fori to Foreign Bills	399
Statutes of Limitation	399
Set-off	400
Power of Arrest	400
Statute of Frauds	400
Protest and Notice of Dishonour	400
Pleading	400
Burthen of Proof	400

Chapter XXXIII.

OF THE REMEDY BY ACTION ON A BILL.

Who may sue on a Bill	402
In another's Name	403
Joining Count on Consideration	403
Against what Parties Actions may be brought	403
Judgment against two Parties	403
Where Defendant is liable in two capacities on the same Bill	403
Proceedings for Costs	404
Costs of Actions that have been brought against the Party suing	404
Trover or Detinue for a Bill	404
Who may sue	405
Amount of the Verdict	405
Effect of Judgment in changing Property	405
Relief in Equity	405
Affidavit to hold to Bail	405
Arrest for Interest	406
Statement of the Sum	406
That the Bill is due	406
Statement of Indorsements	406
Character of Defendant	406
Character of Plaintiff	407

	PAGE
Description of Defendant by his Initials	407
Statement of Consideration	407
Affidavit good in Part	408
Statute 18 & 19 Vict. c. 67	408
One Writ against several Parties	409
VENUE	410
INSPECTION OF THE BILL	410
PARTICULARS OF DEMAND	410
Tender	410
Consolidating Actions	411
STAYING PROCEEDINGS	411
In an Action against the Acceptor	411
When without the Costs in other Actions	411
Summary Interposition of the Court	412
Setting aside Pleas	412
Re-exchange	412
Other Damages	413
Advantages of suing on the Bill rather than on the Consideration	414
Interposition of Equity	414
When Equity will restrain an Action	414
Discovery in aid of Action or Defence	415

CHAPTER XXXIV.

OF THE PLEADINGS IN ACTIONS ON BILLS AND NOTES.

	PAGE
OLD FORMS OF ACTION	417
DEBT	417
ASSUMPSIT	418
DECLARATION	418
Statement of the Parties to the Instrument	418
Of Christian Name by Initials	419
Description of Instrument	419
Statement of Acceptance	420
Of Presentment for Payment	420
Of Notice of Dishonour	420
Of Excuse for omitting to present for Payment, &c.	420
Of Notice of Indorsement	421
Of Protest	421
Of Maturity of Instrument	421
Allegation of Promise to pay	422
Declaration on a Bill drawn in Sets	423
Assignment of the Breach	423
Damages	423
PLEAS	423
General Effect of New Rule	423
Non Assumpsit	423
Nil Debet	424
General Issue by Statute	424
Traverse of Acceptance	424
Traverse of Indorsement	424
Absence of Consideration	425
That Plaintiff is not the Holder	426
Plea of Payment	426
Effect of Pleading over	426
FRAUD	426
Payment	427
Satisfaction	427
Duplicity of Pleas under the old Law	427
Sham and Ensnaring Pleas	428
REPLICATION DE INJURIA SUPERSEDED	429
Replication to Plea denying Consideration	429
Pleading an Estoppel	430
Distributive Replication	430

Chapter XXXV.

EVIDENCE.

	PAGE
Right to begin	431
Splitting Plaintiff's Case	432
Competency of Witnesses	432
Declarations at the Time of making the Instrument	432
Declaration by prior Parties	432
Effect of Admissions on Record	433
Proof of Signature	433
Collateral Security, Memorandum of	433
Identity of Defendant	433
Evidence of Consideration	434
Production of the Bill	434
Proof of Mark	434
Proof of Name	434
Proof of Signature by Agent	434
Effect of Admission under Judge's Order	435
Bill or Note, Evidence under the Common Counts	435
What a Paid Check is Evidence of as between Drawer and Payee	435
As between Banker and Customer	436
Whether an Unpaid Check is Evidence	436
Proofs in various Actions	436
Payee *v.* Maker or Acceptor	436
Indorsee *v.* Maker or Acceptor	436
Indorsee *v.* Indorser or Drawer	437
Payee *v.* Drawer	437
Receipt	437
Statements by deceased Persons	437
Amendment at the Trial	438

Chapter XXXVI.

OF THE BANKRUPTCY OF PARTIES TO A BILL OR NOTE.

	PAGE
Vesting of Bankrupt's property in Trustee	441
Former relation of Adjudication in Bankruptcy	441
Present relation	442
Protected Transactions under former Statutes	442
Under the recent Act	443
What amounts to Notice of Act of Bankruptcy	443
Bill to Petitioning Creditor	444
In what Cases the Holder may prove	444
Bills and Notes not yet due	444
Proof of a Bill or Note payable on Demand	444
Bill payable after Notice	445
Irregular Bill or Note	445
Bill cannot be proved against a Man not a Party to it	445
Proof of Lost Bill	445
Proof by a Surety or Person liable for the Debt of a Bankrupt	445
Debts and Liabilities now provable	447
Holder may elect between Proof and Action	447
Mutual Accommodation Bills	448
Where there has been a Specific Exchange of Securities	448
What amounts to Specific Exchange	449

PAGE

Party to Mutual Specific Exchange of Paper must pay his own Paper before he can prove . . . 449
Mutual Accommodation without Specific Exchange . 449
After Holder has proved, no further Proof . . . 450
Cases of Mutual Accommodation without Specific Exchange, Mutual Bankruptcy, and Cash Balance 450
Accommodation Bills in the Hands of an Indorsee for Value 454
Proof of Interest . . . 455
Of Expenses, Re-exchange, &c. 455
Where there are several Fiats or Adjudications of Bankruptcy, under which, and for how much, the Holder may prove . . . 455
Proof against joint and separate Estate . . . 456
Where a Creditor holds a Bill as a Security . . 456
Proof where a Transfer after Acceptor's Bankruptcy . 457
Acts of Bankruptcy in respect of Bills . . . 457
When a Bill may be a good Petitioning Creditor's Debt 457
Evidence of the Date of a Bill 459
What Transactions in respect of Bills will constitute a Trading within the Bankrupt Laws . . . 459
REPUTED OWNERSHIP . 460
Debts formerly within it . 460
Share of Dormant Partner . 460
Existing Enactments . . 460
Bills in the Hands of a Banker, &c., becoming

PAGE

Bankrupt, do not pass to his Assignees . . . 462
DEPOSITED SECURITIES . 463
Holder's right to benefit of in event of Bankruptcy . 463
Holder's right to Securities deposited with Acceptor . 463
With a third Person . . 464
To Acceptor's Guarantee . 464
Transfer in Case of Bankruptcy of Holder . . 464
Where the Bankrupt is a Trustee 464
When the Transfer of a Bill by a Bankrupt is Payment 464
Transfer to a Bankrupt . 465
When his Capacity admitted 465
Bill or Note for Debt barred by Certificate . . . 465
FRAUDULENT PREFERENCE 466
VOLUNTARY TRANSFER . 467
DISCHARGE OF INSOLVENT DEBTORS . . . 467
Acts recently in Force . 467
Their general object in regard to Bills and Notes . 468
Their effect on the Liability of the Insolvent to Holders of a Negotiable Instrument 468
Effect of Discharge of one of two Makers of a Note . 469
Description of the Bill in the Schedule 469
Notice to the Creditor . . 469
Effect of the Insolvent's Discharge on the Liability of other Persons to the Holder 470
Effect of a Bill or Note given for the Debt for which the Insolvent has been discharged 470
Of a Bill or Note given to prevent Opposition . . 470
Effect of Vesting Order . 470

APPENDIX.

SECTION I.

NOTARY'S FEES OF OFFICE.

PAGE

As settled July 1st, 1799 473

SECTION II.

STATUTES.

9 & 10 WILL. III. c. 17.

An Act for the better Payment of Inland Bills of Exchange . 474

3 & 4 ANNE, c. 9, s. 1.

An Act for giving like remedy upon Promissory Notes as is now used upon Bills of Exchange, and for the better Payment of Inland Bills of Exchange 476

17 GEO. III. c. 30, ss. 1, 2, 4, made perpetual by 27 GEO. III. c. 16.

An Act for further restraining the Negotiation of Promissory Notes and Inland Bills of Exchange, under a Limited Sum, within that Part of Great Britain called England . . 477

48 GEO. III. c. 88, ss. 1, 2, 3, 4.

An Act to restrain the Negotiation of Promissory Notes and Inland Bills of Exchange under a Limited Sum in England 479

55 GEO. III. c. 184, ss. 10 to 29.

An Act for repealing the Stamp Duties on Deeds, Law Proceedings, and other written or printed Instruments, and the Duties on Fire Insurances, and on Legacies and Successions to Personal Estate upon Intestacies, now payable in Great Britain, and for granting other Duties in lieu thereof . 481

58 GEO. III. c. 93.

An Act to afford Relief to the *bonâ fide* Holders of Negotiable Securities, without Notice that they were given for a Usurious Consideration 493

1 & 2 Geo. IV. c. 78. PAGE

An Act to regulate Acceptances of Bills of Exchange . . 493

7 & 8 Geo. IV. c. 15.

An Act for declaring the Law in relation to Bills of Exchange and Promissory Notes becoming payable on Good Friday or Christmas Day 494

9 Geo. IV. c. 14, ss. 1, 3, 4, 5, 8.

An Act for rendering a written Memorandum necessary to the Validity of certain Promises and Engagements . . . 496

2 & 3 Will. IV. c. 98.

An Act for regulating the Protesting for Nonpayment of Bills of Exchange drawn payable at a Place not being the Place of the Residence of the Drawee or Drawees of the same . 497

3 & 4 Will. IV. c. 42, ss. 12, 28, 29.

An Act for the further Amendment of the Law and the better Advancement of Justice 498

5 & 6 Will. IV. c. 41.

An Act to amend the Law relating to Securities given for Considerations arising out of Gaming, usurious and certain other illegal Transactions 499

6 & 7 Will. IV. c. 58.

An Act for declaring the Law as to the Day on which it is requisite to present for Payment to the Acceptors or Acceptor supra Protest for Honour, or to the Referees or Referee in case of Need, Bills of Exchange which had been dishonoured 503

1 & 2 Vict. c. 110, ss. 12, 16, 17.

An Act for abolishing Arrest on Mesne Process in Civil Actions, except in certain Cases; for extending the Remedies of Creditors against the Property of Debtors; and for amending the Laws for the Relief of Insolvent Debtors in England. [16th August, 1838] 504

2 & 3 Vict. c. 29.

An Act for the better Protection of Parties dealing with Persons liable to the Bankrupt Laws. [19th July, 1839] . . 505

2 & 3 VICT. c. 37. PAGE

An Act to amend and extend until the First day of January, One thousand eight hundred and forty-two, the Provisions of an Act of the First Year of her present Majesty, for exempting certain Bills of Exchange and Promissory Notes from the Operation of the Laws relating to Usury. [29th July, 1839] 506

7 & 8 VICT. c. 32.

An Act to regulate the Issue of Bank Notes, and for giving to the Governor and Company of the Bank of England certain Privileges for a limited Period. [19th July, 1844] . . 508

16 & 17 VICT. c. 59.

An Act to repeal certain Stamp Duties, and to grant others in lieu thereof, to amend the Laws relating to Stamp Duties, and to make perpetual certain Stamp Duties in Ireland. [4th August, 1853] 509

17 & 18 VICT. c. 83.

An Act to amend the Laws relating to the Stamp Duties. [10th August, 1854] 513

17 & 18 VICT. c. 90.

An Act to repeal the laws relating to Usury and to the Enrolment of Annuities. [10th August, 1854] 519

17 & 18 VICT. c. 125, s. 87.

An Act for the further Amendment of the Process, Practice and Mode of Pleading in and enlarging the Jurisdiction of the Superior Courts of Common Law at Westminster, and of the Superior Courts of Common Law of the Counties Palatine of Lancaster and Durham. [12th August, 1854] . . 519

18 & 19 VICT. c. 67.

An Act to facilitate the Remedies on Bills of Exchange and Promissory Notes by the Prevention of frivolous or fictitious Defences to Actions thereon. [23rd July, 1855] . . 520

19 & 20 VICT. c. 25.

An Act to amend the Law relating to Drafts on Bankers. [23rd June, 1856] 523

19 & 20 VICT. c. 97.

An Act to amend the Laws of England and Ireland affecting Trade and Commerce. [29th July, 1856] . . . 524

21 VICT. C. 20. PAGE

An Act for granting a Stamp Duty on certain Drafts or Orders for the Payment of Money. [21st May, 1858] . . 527

21 & 22 VICT. C. 79.

An Act to amend the Law relating to Checks or Drafts on Bankers. [2nd August, 1858] 527

23 & 24 VICT. C. 111.

An Act for granting to Her Majesty certain Duties of Stamps, and to amend the Laws relating to the Stamp Duties. [28th August, 1860] 528

26 & 27 VICT. C. 105.

An Act to remove certain Restrictions on the Negotiation of Promissory Notes and Bills of Exchange under a limited Sum. [28th July, 1863] 530

28 & 29 VICT. C. 86.

An Act to amend the Law of Partnership. [5th July, 1865] . 530

32 & 33 VICT. C. 71.

An Act to consolidate and amend the Law of Bankruptcy. [9th August, 1869] 531

INDEX 537

TABLE OF CASES CITED.

A.

	PAGE
Abbott *v.* Aslett	421
——— *v.* Douglas	78
——— *v.* Hendricks ..	85, 99
——— *v.* Hicks	366
——— *v.* Pomfret	466
Abel *v.* Sutton	52
Abell *v.* Daniell ..	466, 467
Abraham *v.* Dubois	399
Abrahams *v.* Skinner	115
Abram *v.* Cunningham ..	55
Absolon *v.* Marks	6
Acheson *v.* Fountain ..	150, 159
Ackerman *v.* Ehrenspurger ..	305
Ackland *v.* Pierce	277
Adames *v.* Bridger	447
Adams *v.* Gregg	198
——— *v.* Jones	151
——— *v.* Palk	427
——— *v.* Wordley	193
Adkins *v.* Farrington	447
Aflalo *v.* Fourdrinier	446
Aggs *v.* Nicholson	73
Agra & Masterman's Bank, In re	368, 464
Agra & Masterman's Bank *v.* Asiatic Bank	96
Agra & Masterman's Bank *v.* Hoffman	414
Agra & Masterman's Bank *v.* Leighton ..	128, 130, 221
Alcard *v.* Wesson	468
Alcock *v.* Alcock	62
Alderson *v.* Langdale ..	322
Aldred *v.* Constable	466
Alexander *v.* Birchfield ..	20
——— *v.* M'Kenzie ..	33
——— *v.* Sizer	36
——— *v.* Strong ..	228, 230
——— *v.* Thomas	93
Allan *v.* Mawson ..	87, 90
Allen *v.* Allen	58
Allen *v.* Dundas	54
——— *v.* Edmundson	274, 279, 297, 300
——— *v.* Harris	231
——— *v.* Keeves	16
——— *v.* Kemble ..	393, 396
——— *v.* Mawson	11
——— *v.* Miller	374
——— *v.* Sea Life Assurance Company	71
——— *v.* Walker	147, 151, 425
Alsager *v.* Close	405
——— *v.* Currie	367
——— *v.* St. Katherine's Dock Company	383
Alston *v.* Andrew	56
Alvarez de la Rosa *v.* Prieto ..	399
Alves *v.* Hodgson	397
Ambrose *v.* Hopwood	214
Amner *v.* Clarke ..	389, 397
Amory *v.* Merryweather	142, 314
Amos *v.* Smith	350
Ancher *v.* Bank of England ..	157
Ancona *v.* Marks ..	2, 32, 403
Anderson *v.* Cleveland ..	198
——— *v.* Heath	191
——— *v.* Hick	191
——— *v.* Sanderson ..	351
——— *v.* Weston ..	76, 459
Andrews *v.* Ellison	43
——— *v.* Franklin	94
Ankerstein *v.* Clarke	420
Anon., 1 Atk. 140	455
——— 1 Camp. 492, n. ..	443
——— 2 Camp. 308, n. ..	419
——— Comb. 401	190
——— 2 Freem. 22	339
——— 12 Mod. 345 ..	255, 260
——— 12 Mod. 447	86
——— 1 Ld. Raym. 743	183, 216, 257
——— 1 Salk. 278	338

PAGE

Anon. v. Adams 170
——— v. Handcock 58
Ansell v. Baker 198, 233, 235
Anson v. Bailey .. 217, 299
Antoine v. Morshead 138
Appleby v. Biddulph 94
Applegarth v. Colley 138
Appleton v. Donaldson .. 175
——— v. Sweetapple 207, 208
Aranguren v. Scholfield .. 374
Archer v. Bamford 132
——— v. Hale 246
——— v. Hudson 61
Arden v. Sharpe 46
——— v. Watkins 464
Armani v. Castrique 260, 390, 480
Armfield v. Allport .. 89, 90
——— v. Armport 187
Armistead v. Philpot 9
Armstrong v. Christiani 273, 274
Arnold v. Bainbridge 364
Arnould v. Revoult 66
Arthur v. Beales 426
Arundel Bank v. Goble .. 247
Ashbee v. Pidduck 244
Ashby v. Ashby .. 57, 58
——— v. James 350
Ashley v. Killick .. 143, 470
Ashpitle v. Bryan 199
Ashton v. Freestun .. 237, 238
Astley v. Johnson .. 46, 128
Atkins, Ex parte 457
——— v. Owen 224
——— v. Tredgold 349, 352, 353
Atkinson v. Bayntun 247
——— v. Brindall 466
——— v. Davies 426
——— v. Denby .. 119, 133
——— v. Elliott 367
——— v. Hawdon 322
Attenborough v. Mackenzie 172, 223
Attorney-General v. Stephens 123
——— v. Valabreque 419
Attwood v. Griffin .. 82, 321
——— v. Munnings 32, 33, 35
Atwood v. Crowdie 126, 167, 169
Aubert v. Walsh .. 23, 24, 228
Auriol v. Thomas 310
Austin v. Bunyard .. 17, 77, 116
——— v. Young 100
Awde v. Dixon .. 82, 329
Ayliff v. Scrimshire 369
Ayliffe v. Archdale 58
Ayrey v. Fearnsides .. 92, 93
Ayton v. Bolt 347

B.

PAGE

Backhouse v. Harrison .. 16
Bacon v. Searles .. 173, 22
Badnall v. Samuel 24
Bagnall v. Andrews 40
Baidwell v. Lydall 22
Baildon v. Walton 35
Bailey v. Bidwell 120, 121, 12
——— v. Bodenham .. 19, 20
——— v. Edwards 24
——— v. Porter .. 213, 27
Bailie v. Grant 45
Baillie v. Moore 38
Baker v. Birch 285, 293, 29
——— v. Charlton 4
——— v. Townshend .. 13
——— v. Walker .. 126, 12
——— v. White 13
Balbi v. Batley 40
Baldwin, Ex parte 45
——— v. Richardson 296, 42
Balfour v. Ernest 7
——— v. Sea Fire and Life Insurance Company 12
Ball v. Gordon 41
Ballard v. Randall 2
Balmanno v. Thompson .. 42
Bamfield v. Tupper 35
Banbury v. Lissett .. 95, 19
Bancks v. Camp 42
Bancroft v. Hall .. 278, 27
Bank of Bengal v. M'Cleod .. 3
——— v. Fagan .. 16
Bank of England v. Anderson 69, 7
——— v. Newman 16
Bank of Hindustan v. Smith 31
Bank of Ireland v. Archer .. 18
——— v. Beresford 12
243, 245, 45
Banting v. Jadis 40
Barber, Ex parte 45
——— v. Backhouse .. 46, 13
——— v. Gingell 3
——— v. Lemon 42
——— v. Richards .. 151, 16
Barclay, Ex parte 235, 284, 283, 44
——— v. Bailey 21
——— v. Walmsley 30
Barfoot v. Goodhall 5
Baring v. Clark 26
Barker v. Sterne .. 86, 89
——— v. Talcot 5
Barksdale v. Morgan 20
Barkworth, Ex parte 46
Barlow v. Bishop .. 63, 6
——— v. Broadhurst .. 92, 10

	PAGE
Barnes v. Hedley	314
——— v. Worlich	309
Barnett v. Brandao	2, 164, 174
——— v. Skinner	7
Barough v. White	169, 304, 432
Barratt, Ex parte	456
Barrington, In re	162, 445
Bartholomew v. Henley	4
Bartlett v. Benson	155, 156, 167, 270
——— v. Emery	60
——— v. Smith	398
——— v. Wells	60
Bartley v. Hodges	395
Barton v. Gainer	125
Bartrum v. Caddy	113, 169, 171, 224, 371
Basan v. Arnold	426
Baskerville v. Brown	362, 363, 364
Bass v. Clive	199, 200, 418
Bassett v. Dodgin	119, 446
Bastable v. Pool	40
Batard v. Hawes	254
Batchellor v. Lawrence	9, 258
Bateman v. Joseph	183, 296, 297
——— v. Pinder	351
Bathe v. Taylor	319
Batley v. Catterall	429
Batson v. King	253
Battley v. Lewis	49
Batty v. Marriott	140
Baxter v. Lord Portsmouth	62
Bayard v. Shunk	159
Bayle, Ex parte	367
Bayley v. Ashton	355
——— v. Homan	232
Baylis v. Dineley	58
Bayly v. Schofield	465
Baylye v. Hughes	417
Baynes v. Fry	310
Beaching v. Gower	20
Bealy v. Greenslade	351
Beard v. Webb	63
Beardsley v. Baldwin	92
Beauchamp v. Cash	275
——— v. Parry	432
Beanfoy, Ex parte	444, 449
Beaumont v. Greathead	223, 228, 232, 414
——— v. Reeve	135
Beavan v. M'Donnell	62
Beck v. Beverley	469
—— v. Robley	113, 171
Beckwith v. Corral	371
Bedford v. Brutton	43
Bedford v. Deakin	49, 199, 235, 250, 381
Beech v. Jones	404
Beecham v. Smith	7, 8, 42
Beeching v. Gower	202, 218
——— v. Westbrook	28
Beeley v. Wingfield	137
Beeman v. Duck	200
Belcher v. Bellamy	461
——— v. Campbell	461, 462
Bell, Ex parte	445, 460
—— v. Banks	234, 250
—— v. Buckley	224, 230
—— v. Coleman	316
—— v. Frankis	300
—— v. Gardiner	322
—— v. Gunn	433
—— v. Lord Ingestre	151, 425
Bellamy v. Majoribanks	22
Bellasis v. Hester	183
Bellingham v. Frere	240
Belshaw v. Bush	221, 232, 233, 235, 379
Bengal, Bank of, v. M'Cleod	38
——— v. Fagan	164
Benham v. Lord Mornington	400
Bennett v. Farnell	80, 81
Bennison v. Thelwell	427
Benson v. White	423
Bentham v. Lord Chesterfield	26
Bentinck v. Connop	138
——— v. Dorrien	193, 195, 257
Bentley v. Northouse	6, 435
Bentzing v. Scott	438
Berrington v. Collis	315
Berry v. Alderman	121
Besant v. Cross	99, 193
Best v. Barker	470
Betts v. Kimpton	65
Bevan v. Gething	355
——— v. Hill	373, 374
——— v. Nunn	466
Beveridge v. Burgis	297
Bevin v. Chapman	342
Bickerdike v. Bollman	292
Bickerton v. Burrell	37
Biggs v. Lawrence	136
Bignold, Ex parte	14, 16, 216, 292
——— v. Waterhouse	289, 297
Bilbie v. Lumley	298
Billing v. Devaux	192
Bingham v. Stanley	121, 433
Bingley v. Maddison	458
Binnington v. Wallis	135
Birch v. Jervis	142
—— v. Tebbutt	226

PAGE

Bird, Ex parte.. 445
—— v. Gammon 347
Bire v. Moreau 399
Birkett, Ex parte 442
Bishop v. Chambre 323
——— v. Church 53
——— v. Crawshay 465
——— v. Hayward 155
——— v. Rowe 235, 382, 383, 414
——— v. Shillito 382
——— v. Young .. 85, 417
Bishop of Winchester v. Fournier 179
Bittleston v. Timmis 367
Black v. Peel 198
Blackburn, Ex parte .. 160, 445
Blackhan v. Doren 294
Blackie v. Pidding 374
Blades v. Free 88
Blake v. Beaumont 213
—— v. White.. 247
Blakely Ordnance Company, Re 67, 68
Blakesley v. Smallwood .. 363
Blanckenhagen v. Blundell 80, 94
Bland v. Haselrig 352
Blaney v. Hendricks 304
Blaxton v. Pye 139
Bleadon v. Charles 156
Bleasard v. Hirst .. 269, 298
Bleasby v. Crossley 457
Block v. Bell 87, 90
Blogg v. Kent 410
Blount v. Barrow 176
——— v. Burrow 177
Bloxham, Ex parte 449, 455, 456, 457
Boddington v. Schlencker 19, 20, 22
Boden v. Wright 425
Bodenham v. Purchas.. .. 226
Bodyer v. Archer 350
Bolitho, Ex parte .. 44, 48
Bolland v. Bygrave 126
——— v. Nash .. 366, 367
Bolton, Ex parte .. 342, 457
——— v. Dugdale 92
——— v. Puller .. 157, 462
Bonar v. Michell 255
Bonbonus, Ex parte 47
Bond v. Pittard 40
—— v. Stockdale 85
—— v. Warden .. 15, 20, 384
Bonsor v. Cox 245
Bontien's Case.. 331
Booth v. Bank of England .. 70
—— v. Coldman 469

PAGE

Booth v. Grove 43
—— v. Jacobs .. 299, 30
—— v. Payne 41
—— v. Quin 51, 5
Bopart v. Hicks 1
Borough v. Perkins 25
Borradaile v. Lowe 29
Bosanquet v. Anderson 154, 43
——— v. Corser 10
——— v. Dudman 12
——— v. Foster 10
——— v. Wray 22
Boswell v. Smith 2
Bottom, Ex parte 45
Bottomley v. Fisher .. 71, 7
——— v. Nuttall 37
Boucher v. Lawson 39
Boulager v. Talleyrand .. 26
Boultbee v. Stubbs .. 251, 29
Boulton v. Coghlan 14
——— v. Welch 27
Bouts v. Ellis 17
Bowerbank v. Monteiro 98, 19
Bowmaker v. Moore 24
Bowman v. Horsey 34
——— v. Nichol 31
Bowness & Padmore, In re .. 44
Bowyer v. Bampton 13
Boyd v. Emmerson ..21, 170, 33
Boydell v. Champneys 468, 46
——— v. Drummond .. 5
——— v. Harkness .. 212, 21
Bradburne v. Whitbread .. 11
Bradbury v. Emans .. 421, 42
Bradlangh v. De Rin 39
Bradley v. Bardsley 111, 117, 32
——— v. James 35
Bradshaw v. Saddington .. 40
Braithwaite v. Coleman .. 36
——— v. Gardiner 199, 46
Bramah v. Roberts 42
Brandao v. Barnett .. 2, 164, 17
Brandon v. Nesbitt 6
——— v. Scott 4
Brandram v. Wharton .. 35
Bray v. Hadwen .. 281, 28
—— v. Manson 24
Bree v. Holbech 34
Brett v. Levett.. 99, 292, 298, 45
Brewin v. Short 46
Brickwood v. Annis 24
Bridges v. Berry .. 291, 38
Bridget v. Mills 44
Bridgman v. Sheehan 32
Brigstock v. Smith 34
Brill v. Crick 9

	PAGE
Brind *v.* Hampshire	151
Briscoe *v.* Hill	362
Bristol (Earl of) *v.* Wilsmore	382
Bristow *v.* Seequeville	397
British Linen Company *v.* Caledonian Insurance Company	332
British Linen Company *v.* Drummond	399
Britten *v.* Hughes	133
——— *v.* Webb	155
Brix *v.* Braham	127
Brocklebank *v.* Moore	254
Bromage *v.* Lloyd	57, 174
——— *v.* Vaughan	275
Bromley *v.* Brunton	20, 176
——— *v.* Holland	179, 376
Bronwell *v.* Bonney	299, 301
Brook *v.* Coleman	406
——— *v.* Middleton	310
Brooks *v.* Elkins	11, 29
——— *v.* Mitchell	169, 209
——— *v.* Stuart	238
Brough *v.* Parkins	276
Broughton *v.* Manchester Waterworks Company	68, 142
Brown, Ex parte	457
——— *v.* Davis	167
——— *v.* Gracey	401
——— *v.* Hancock	355
——— *v.* Harraden	6, 206
——— *v.* Joddrell	62
——— *v.* Kempton	466
——— *v.* Kewley	382, 383
——— *v.* Kidger	43, 45
——— *v.* Maffey	293, 294
——— *v.* M'Dermott	202
——— *v.* Messiter	374
——— *v.* Philpot	121
——— *v.* Saul	10
——— *v.* Selwyn	56
——— *v.* Turner	142
——— *v.* Wilkinson	245
Browne *v.* Carr	249
——— *v.* De Winton	6, 89
——— *v.* Heward	342
——— *v.* Lee	253, 254
——— *v.* Murray	120
——— *v.* Rivers	221
——— *v.* Ward	175
Brownell *v.* Bonny	421
Browning *v.* Kinnear	296
——— *v.* Reane	63
Bruce *v.* Bruce	162, 333
——— *v.* Hurly	462
Brutt *v.* Picard	321
Bryant *v.* Christie	133
Brymer, Ex parte	457
Bryson *v.* Wylie	461
Buchanan, Ex parte	462
——— *v.* Findlay	367
——— *v.* Rucker	397
Buck *v.* Hurst	29
Buckland *v.* Newsame	458
Buckler *v.* Angel	422
——— *v.* Buttivant	125, 449
Buckley, Ex parte	7, 44, 48
——— *v.* Barber	58
——— *v.* Campbell	420
——— *v.* Guilbank	311
——— *v.* Jackson	157
Buckmaster *v.* Russell	347
Buckworth *v.* Levy	406
——— *v.* Simpson	112, 116
Bulbeck *v.* Jones	8
Bullen *v.* Sharpe	45
Buller *v.* Crippe	6, 389
Bullock *v.* Dodds	3, 67
——— *v.* Richardson	415
Bullpin *v.* Clarke	64
Bulmer, Ex parte	444
Bult *v.* Morrell	37
Bulteel *v.* Jarrold	246, 247
Bunn *v.* Martham	176
Bunney *v.* Poyntz	383
Burbridge *v.* Manners	55, 172, 222, 223, 229, 282
Burchfield *v.* Moore	318, 323, 331
Burden *v.* Benton	129
Burgess, In re	303, 457
——— *v.* Merrill	60
Burgh *v.* Legge	99, 216, 270, 292, 300, 420
Burleigh *v.* Stott	352, 353
Burke's case	251
Burke *v.* Jones	348
Burkett *v.* Blanchard	410
Burmester *v.* Barron	277
——— *v.* Hogarth	147, 148, 435
Burn, Ex parte	456
——— *v.* Boulton	349
Burnard *v.* Haggis	60
Burnell *v.* Minot	8
Burrough *v.* Moss	66, 168, 363
Burrows *v.* Jemimo	394
Burt *v.* Palmer	351
Bury *v.* Blogg	439
Bush *v.* Kinnear	214
——— *v.* Martin	357
Butler *v.* Cumpston	64
——— *v.* Malisy	420
——— *v.* Mountgarret	77
Butts *v.* Swann	103

PAGE

Buvelot *v.* Mills 134
Buxton *v.* Jones .. 213, 214
Byrom *v.* Thompson 321

C.

Callander *v.* Howard 224
Callow *v.* Lawrence 113, 171, 221
Calvert *v.* Baker 322
——— *v.* Gordon 249
Calye's case 3
Cameron *v.* Smith 303, 305, 457
Camidge *v.* Allenby 159, 160, 161, 163, 202, 210, 216, 383
Campbell *v.* French .. 78, 207
——— *v.* Webster 217, 260, 301
Cannan *v.* Bryce 141
Cannam *v.* Farmer .. 61, 64, 431
——— *v.* Wood 466
Capp *v.* Lancaster 341
Carew, In re 126, 289
——— *v.* Duckworth 292
Carlon *v.* Ireland 22, 164, 166
——— *v.* Kenealy .. 7, 207
Carlos *v.* Fancourt .. 92, 95
Carr *v.* Burdiss 466
—— *v.* Eastabrook 225
—— *v.* Shaw 6
—— *v.* Stephens .. 98, 369
Carrol *v.* Blencow 64
Carruthers *v.* West 167
Carstairs, Ex parte 251
——— *v.* Bates 462
——— *v.* Rolleston .. 243
——— *v.* Stein 310
Carter *v.* Flower 292, 293, 420, 421
——— *v.* Ring 341
——— *v.* Wormald 378
Cartwright *v.* Cook .. 232, 378
——— *v.* Williams 170, 198
Carvick *v.* Vickery 52, 150, 200
Cary *v.* Gerrish 23
Casborne *v.* Dutton .. 11, 28
Cash *v.* Taylor 33
Castleman *v.* Ray 15
Castrique *v.* Battigieg .. 153
——— *v.* Bernabo 283
Caswell *v.* Coare 407
Catherwood *v.* Chabaud .. 56
Catling *v.* Skoulding 348
Catterall *v.* Hindle 381
Catton *v.* Simpson 320
Caunce *v.* Rigby 406
Caunt *v.* Thompson 270, 271, 274, 296, 439

PAGE

Cawley *v.* Turnell 34
Cecil *v.* Plaistow .. 134, 24
Chadwick *v.* Allan 6, 8
Chalie *v.* Belshaw 19
Chalmers *v.* Lanion 16
Chamberlain *v.* Porter .. 11
Chamberlyn *v.* Delarive .. 38
Chambers *v.* Jones 7
——— *v.* Miller 23
——— *v.* Smith 46
Champion *v.* Terry 37
Chandler *v.* Parkes 6
——— *v.* Vilett 34
Channell *v.* Ditchburn .. 35
Chapcott *v.* Curlewis 29
Chaplin *v.* Levy 43
Chapman *v.* Black .. 144, 31
——— *v.* Cotterell 5, 151, 195, 398
——— *v.* Keane .. 284, 285
Chappell, Ex parte 28
——— *v.* Cooper 5
Chapple *v.* Durston .. 338, 357
Chard *v.* Fox 27
Charles *v.* Marsden .. 129, 167
Charnley *v.* Grundy 37
Chaters *v.* Bell .. 154, 256, 437
Chaworth *v.* Beech 4
Cheap *v.* Harley 387
Check *v.* Roper 183
Cheetham *v.* Butler 107
——— *v.* Ward .. 55, 238
Chesmer *v.* Noyes 260
Chesterfield *v.* Jansen .. 312
Chievly *v.* Bond 348
Child *v.* Monins 57
Childers *v.* Boulnois .. 11, 28
Chilton *v.* Carrington .. 415
China Steam Company, Re .. 67
Cholmley *v.* Darley .. 97, 126
Christie *v.* Fonsick 341
——— *v.* Peart .. 419, 422
Church *v.* Imperial Gas Company 68
Clack *v.* Sainsbury 314
Clanricarde, Ex parte .. 449
Claridge *v.* Dalton 242, 243, 295
Clark *v.* Alexander .. 350, 351
—— *v.* Clement 235
—— *v.* Devlin 252
—— *v.* Hooper 355
—— *v.* Hougham 342
—— *v.* Pigott 151, 152
Clarke, In re 44, 48
——— *v.* Cock .. 184, 190
——— *v.* Dixon 132

	PAGE
Clarke *v.* Fell	.. 367
——— *v.* Holmes ..	.. 120
——— *v.* Laurie ..	.. 415
——— *v.* Lazarus ..	.. 130
——— *v.* Martin ..	.. 435
——— *v.* Perceval ..	.. 93
——— *v.* Powell ..	.. 141
——— *v.* Quince ..	.. 374
——— *v.* Sharpe ..	.. 276
——— *v.* Wilson ..	.. 244
Claxton *v.* Swift ..	284, 249
Clay *v.* Crowe	.. 374
—— *v.* Turley	.. 409
Clayton *v.* Gosling 85, 94,	341, 445
——— *v.* Jennings ..	.. 139
——— *v.* Kynaston ..	.. 55
Clayton's case	.. 226
Cleave *v.* Jones ..	.. 355
Clegg *v.* Levy	.. 397
Clements *v.* Langley ..	.. 446
Clerk *v.* Blackstock ..	7, 44, 321
Clerke *v.* Martin ..	.. 6
Clifford *v.* Parker ..	.. 322
Clode *v.* Bailey ..	25, 289
Close *v.* Phipps ..	.. 119
Cloves *v.* Williams ..	.. 417
Clugas *v.* Penaluna ..	.. 397
Clun's case	.. 417
Cochrane *v.* Green ..	360, 369
Cock *v.* Coxwell ..	.. 322
Cockell *v.* Gray ..	.. 204
Cockerill *v.* Sparke ..	.. 347
Cocks, Ex parte ..	.. 303
——— *v.* Barradale ..	.. 154
——— *v.* Masterman ..	.. 335
——— *v.* Nash ..	238, 246
Cockshott *v.* Bennett ..	.. 133
Cole *v.* Blake	229, 411
—— *v.* Gower	.. 137
Colehan *v.* Cook ..	78, 94
Coleman *v.* Bredman ..	.. 404
——— *v.* Sayer ..	204, 207
Coles *v.* Gum	.. 407
—— *v.* Sybsye ..	.. 343
Colkett *v.* Freeman ..	.. 457
Collen *v.* Wright ..	.. 38
Collenridge *v.* Farquharson	126, 168
Collier *v.* Willcock ..	.. 351
Collinge *v.* Heywood ..	.. 342
Collins *v.* Benning ..	.. 341
——— *v.* Butler ..	183, 216
——— *v.* Collins ..	.. 361
——— *v.* Jones ..	.. 367
——— *v.* Martin	128, 157, 164
——— *v.* Prosser ..	.. 254
Collinson's Case ..	.. 326

	PAGE
Collinson *v.* Margesson	.. 347
Collis *v.* Emett ..	81, 86
Collott *v.* Haigh ..	.. 243
Colombier *v.* Slim ..	.. 173
Combe's Case	31, 36
Combe *v.* Woolf ..	.. 247
Commercial Bank of India, In re	368
Conflans Company *v.* Parker	.. 96
Conier & Holland's Case	.. 231
Connop *v.* Meakes	.. 315
Connor *v.* Martin ..	.. 65
Conro *v.* Port Henry Iron Co.	37
Conway *v.* Nall ..	.. 443
Cook *v.* Lister	.. 221
—— *v.* Long	.. 127
—— *v.* Wright ..	127, 233
Cooke *v.* Clayworth ..	.. 63
—— *v.* Colehan ..	.. 94
—— *v.* French ..	.. 274
Coombe *v.* Miles ..	.. 312
Coombes *v.* Dibble ..	.. 139
Coombs *v.* Ingram ..	85, 126
Cooper *v.* Amos ..	.. 410
——— *v.* Machin ..	.. 457
——— *v.* Mayer ..	.. 200
——— *v.* Morecroft ..	.. 427
——— *v.* Parker ..	.. 232
——— *v.* Pepys ..	.. 456
——— *v.* Shepherd ..	.. 405
——— *v.* Turner ..	.. 358
——— *v.* Waldegrave, Earl of	396
——— *v.* Willomatt ..	.. 405
Coore *v.* Callaway ..	.. 35
Copis *v.* Middleton ..	.. 252
Coppin *v.* ——— ..	.. 65
Coppock *v.* Bower ..	113, 137
Cordery *v.* Colville	299, 300, 420
Corlett *v.* Jones ..	.. 283
Corner *v.* Shaw ..	.. 57
Cornes *v.* Taylor ..	228, 411
Corney *v.* Mendez da Costa	.. 293
Cornfoot *v.* Fowke ..	.. 124
Cornforth *v.* Smithard	.. 347
Cornill *v.* Hudson ..	.. 345
Cory *v.* Scott	292, 293, 300, 420
Cotes *v.* Davis	.. 65
—— *v.* Harris	.. 348
Cothay *v.* Fennell ..	.. 49
Cottam *v.* Partridge ..	.. 339
Cotton *v.* Godwin ..	.. 229
——— *v.* Horsemanden	.. 304
Cougan *v.* Banks ..	.. 396
Court *v.* Partridge ..	.. 56
Cowell *v.* Edwards ..	253, 254
——— *v.* Watts ..	.. 56
Cowie *v.* Halsall ..	.. 318

	PAGE
Cowie *v.* Harris ..	76, 459
—— *v.* Stirling	5, 79, 93, 95
Cowley *v.* Dunlop	125, 449, 457
Cowper *v.* Green ..	.. 239
——— *v.* Smith ..	.. 251
Cox *v.* Coleman ..	.. 190
—— *v.* Hickman ..	.. 45
—— *v.* Read	.. 469
—— *v.* Troy	151, 195
Coxon *v.* Lyon	.. 77
Cramlington *v.* Evans	84, 149, 157
Crampton *v.* Walker ..	.. 361
Cranch *v.* Kirkman ..	.. 348
——— *v.* White ..	60, 405
Crank *v.* Frith	.. 433
Craven *v.* Edmondson	.. 365
Crawfoot *v.* Gurney ..	.. 103
Crawford *v.* Stirling ..	.. 361
Craythorne *v.* Swinburne	244, 253, 254
Cresswell *v.* Crisp ..	.. 417
Crew *v.* Petet	37, 73
Cricklow *v.* Parry ..	.. 153
Cripps *v.* Davis	169, 170, 354
——— *v.* Hartnall ..	.. 258
Crisp *v.* Griffiths ..	379, 427
Critchlow *v.* Parry ..	.. 437
Crofts *v.* Beale	127, 425
Crogate's Case	.. 429
Cromwell *v.* Hynson ..	258, 276
Crook *v.* Jadis	.. 164
Crookshanks *v.* Rose	143, 144, 226
Cropper *v.* Cook ..	.. 87
Crosby *v.* Clarke ..	.. 406
Cross, In re	.. 134
—— *v.* Cheshire ..	.. 44
—— *v.* Morgan ..	.. 406
Crosse *v.* Smith ..	279, 288
Crossley, Ex parte ..	454, 457
——— *v.* Ham ..	.. 166
Crotty *v.* Hodges ..	.. 322
Crowe *v.* Clay	373, 382
Croxon *v.* Worthen ..	.. 217
Crutchley *v.* Clarence ..	82, 166
——— *v.* Mann ..	82, 398
Cuff *v.* Browne ..	.. 131
Cullen *v.* Thompson ..	.. 88
Culverhouse *v.* Alexander	.. 415
Cumber *v.* Wane ..	.. 232
Cumming *v.* Baily	3, 365, 457, 466
——— *v.* French ..	.. 298
——— *v.* Shand ..	19, 222
Cundy *v.* Marriott	113, 114, 298, 384
Cunliffe *v.* Maltass ..	.. 408
——— *v.* Whitehead ..	.. 150
Curlewis *v.* Corfield ..	.. 300
——— *v.* Lord Mornington	348
Curtis *v.* Rickards ..	.. 29
——— *v.* Rush ..	.. 380
Cuthbert *v.* Haley ..	.. 313

D.

Dabbs *v.* Humphries ..	.. 403
Da Costa *v.* Jones ..	.. 136
Dacy *v.* Clinch	.. 343
Dagnall *v.* Wigley ..	.. 311
Daintree *v.* Hutchinson	.. 138
Dalrymple *v.* Fraser ..	.. 7
Daniels *v.* Ryle ..	.. 20
Darbishire *v.* Parker	207, 278, 279
Darlington Bank, Case of the	46
Darnell *v.* Williams ..	.. 130
Davey *v.* Prendergrass	.. 246
David *v.* Preece ..	.. 233
Davidson *v.* Cooper ..	196, 317
Davies *v.* Dodd ..	155, 376
——— *v.* Edwards ..	.. 354
——— *v.* Humphreys ..	.. 253
——— *v.* Lowndes ..	.. 77
——— *v.* Stainbank ..	243, 244
——— *v.* Wilkinson ..	.. 92
Davis *v.* Barker ..	.. 434
—— *v.* Clarke	86, 87, 186
—— *v.* Dodd	.. 374
—— *v.* Gyde	.. 380
—— *v.* Hardacre ..	.. 312
—— *v.* Holding ..	.. 142
—— *v.* Jones	76, 100
—— *v.* Lowndes ..	.. 459
—— *v.* Mason	.. 136
—— *v.* Smyth	.. 303
Davison, Ex parte ..	.. 445
——— *v.* Franklin ..	.. 144
——— *v.* March ..	.. 406
——— *v.* Robertson	.. 386
Dawe *v.* Holdsworth ..	.. 226
Dawkes *v.* Lord de Loraine ..	94
Dawson *v.* M'Donald ..	.. 115
——— *v.* Morgan ..	404, 411
——— *v.* Prince ..	.. 65
Day *v.* Padrone ..	.. 65
—— *v.* Stuart	.. 142
Deacon *v.* Stodhart	222, 266, 428
Deakin *v.* Pennial ..	112, 116
Dean *v.* Newhall ..	.. 238
De Begnis *v.* Armistead	.. 143
De Berdt *v.* Atkinson	.. 216
De Bergareche *v.* Pillin	.. 214
De Bernales *v.* Fuller ..	.. 186
Deering *v.* Earl of Winchelsea	253

	PAGE
Deey, Ex parte ..	.. 457
Deeze, Ex parte ..	.. 366
Debers v. Harriot	87, 90, 207, 387
De la Chanmette v. Bank of England	6, 39, 119, 126, 395, 401
De la Courtier v. Bellamy	.. 76
Delatorre v. Barclay ..	.. 198
De la Vega v. Vianna	.. 400
Delauney v. Michell ..	.. 120
De Mantort v. Saunders	.. 50
Dendy v. Powell ..	.. 362
Denne v. Knott ..	.. 470
Dennis v. Morrice ..	291, 298
Dennistoun v. Stewart	.. 275
Dent v. Dunn	24, 305
Derry v. Duchess of Mazarine	64
Desbrowe v. Weatherby	318, 323
De Tastet, Ex parte ..	.. 456
——— v. Baring ..	.. 413
Denters v. Townsend ..	.. 173
Dewar v. Span.. ..	.. 313
Dewdney, Ex parte ..	338, 444
Dickenson v. Dickenson	.. 76
——— v. Teague	90, 343, 357
Dickinson, Ex parte ..	.. 457
——— v. Hatfield ..	348, 414
——— v. Valpy ..	45, 50
Dickson, Ex parte ..	.. 380
——— v. Cass ..	.. 365
——— v. Evans ..	.. 364
——— v. Thomson..	.. 346
——— v. Vale of Neath Railway Company ..	.. 68
Dillon v. Rimmer ..	235, 383
Dingwall v. Dunster ..	.. 198
Diplock v. Hammond ..	.. 104
Ditchburn v. Goldsmith	.. 136
Dixon v. Chambers ..	.. 107
——— v. Clark ..	.. 229
——— v. Elliott ..	298, 300
——— v. Holroyd ..	.. 384
——— v. Johnson ..	.. 297
——— v. Nuttall	11, 78, 91, 94, 204, 207, 215, 341
Dobie v. Larkin ..	.. 410
Dobree v. Eastwood ..	276, 278
Dobson v. Espie	196, 197, 231
Dod v. Edwards	55, 173, 223, 237
Doe d. Durore v. Jones	.. 345
—— d. Vine v. Figgins	.. 403
—— v. Boulcot ..	.. 442
—— v. Catermore ..	.. 323
—— v. King	.. 315
—— v. Palmer ..	.. 323
—— v. Somerton ..	.. 301
—— v. Whittingham ..	112, 116
Dodge v. Pringle ..	320, 321
Doman v. Dibden ..	.. 303
Don v. Lipman	396, 399, 400
Donaldson v. Thompson	422, 424
Done v. Whalley ..	.. 254
Donovan v. Duff ..	.. 442
Dorchester v. Webb ..	55, 56
Doty v. Smith ..	.. 7
Douglas v. Holme ..	.. 29
Douthat, Ex parte ..	.. 457
Dover v. Maestaer ..	.. 113
Dowbiggin v. Bourne ..	.. 243
——— v. Harrison	.. 57
Dowling v. Ford ..	.. 355
Down v. Halling	78, 169, 375
Downes v. Garbut ..	.. 315
——— v. Richardson ..	.. 320
Downman, Ex parte ..	.. 445
Drage v. Ibberson ..	.. 137
——— v. Netter ..	.. 238
Drain v. Harvey ..	.. 415
Drake v. Mitchell ..	.. 380
Draper v. Glossop ..	.. 338
Drayton v. Dale	60, 199, 465
Druiff v. Parker (Lord)	42, 414
Drury v. Macaulay ..	.. 93
——— v. Smith ..	9, 176
Du Belloix v. Lord Waterpark	228, 305
Duck v. Braddyll ..	.. 116
Dufaur v. Oxenden ..	.. 190
Duffield v. Creed ..	228, 258
——— v. Elwes ..	.. 176
Dumas, Ex parte ..	.. 462
Duncan v. Lowndes ..	.. 49
——— v. Scott ..	.. 119
Dunn v. O'Keefe ..	.. 270
Dupays v. Shepherd ..	.. 186

E.

	PAGE
Eagle Bank of Newhaven v. Smith	.. 162
Eales v. Dicker ..	.. 435
Eames v. Smith ..	.. 117
Earle, Ex parte ..	451, 453
Easley v. Crockford ..	.. 372
East v. Smith	270, 271, 285
Eastern Union Railway Co. v. Symonds	.. 438
East India Company v. Paul ..	338
——— v. Tritton	154, 220
East London Waterworks' Co. v. Bailey	.. 68

	PAGE
Easton v. Prachett ..	124, 425
Eastwood v. Bain ..	73, 186
——— v. Brown ..	.. 469
——— v. Kenyon ..	.. 127
——— v. Saville ..	.. 355
Easum v. Cato ..	.. 366
Eaton v. Bell ..	.. 73
Eddison v. Pigram ..	.. 423
Edgar v. Knapp ..	.. 9
Edge v. Bumford ..	.. 376
—— v. Frost ..	.. 407
—— v. Rumford ..	.. 155
Edgecombe v. Rodd ..	137, 232
Edie v. East India Co.	150, 157, 159
Edis v. Bury ..	.. 90
Edmeades v. Newman..	.. 366
Edmonds v. Cates ..	.. 273
Edmunds v. Bushell ..	32, 37
——— v. Downes ..	347, 348
——— v. Groves	120, 140, 433
Edwards, Ex parte ..	447, 462
——— v. Baugh ..	.. 233
——— v. Cameron Coal Co.	71, 72
——— v. Cooper ..	.. 8
——— v. Dick	90, 139, 289, 406
——— v. Grace ..	.. 56
——— v. Jones ..	85, 99
Egan v. Threlfall ..	.. 163
Egg v. Barnett ..	23, 228
Elford v. Teed ..	.. 210
Elgar, Ex parte ..	.. 445
Elliot's case	78, 82
Elliot v. Ince	.. 62
Elliott v. Cowper ..	.. 86
Ellis v. Mason	.. 11
—— v. Wild	.. 162
Ellison v. Collingridge	.. 79
——— v. Dezell ..	.. 249
Ellston v. Deacon ..	.. 47
Elsam v. Denny ..	.. 222
Emanuel v. Randall ..	.. 429
Emblin v. Dartnell ..	.. 214
Emery v. Day ..	340, 352
Emly, Ex parte ..	.. 43
—— v. Lye	43, 160
Emmett v. Tottenham ..	2, 402
England (Bank of) v. Anderson	69, 70
——— v. Newman	160
English v. Darley	235, 247, 248, 249, 252
Ereskine v. Murray ..	.. 86
Esdaile v. Lanauze	32, 179, 331
——— v. M'Lean ..	407, 419
——— v. Sowerby	202, 277, 297
Eskey v. Lake	.. 61
Evans v. Bremridge ..	238, 415
Evans v. Cramlington	149, 1[illegible]
——— v. Drummond	48, 52, 19[illegible] 3[illegible]
——— v. Jones ..	.. 1[illegible]
——— v. Kymer ..	156, 4[illegible]
——— v. Lewis ..	.. 4[illegible]
——— v. Phillpotts ..	.. [illegible]
——— v. Powis ..	.. 4[illegible]
——— v. Prosser ..	.. 3[illegible]
——— v. Underwood ..	.. [illegible]
——— v. Whyle ..	.. 1[illegible]
——— v. Williams	143, 249, 4[illegible]
Everard v. Watson ..	.. 2[illegible]
Everett v. Collins ..	.. [illegible]
——— v. Robertson ..	.. 3[illegible]
Ewer v. Lady Clifton	.. 3[illegible]
—— v. Jones	.. 3[illegible]
Exon v. Russell	87, 89, 2[illegible]
Eyre v. Everest ..	.. 2[illegible]
—— v. M'Dowell ..	.. 1[illegible]
—— v. Waller	26, 4[illegible]
Eyton v. Littledale ..	.. 3[illegible]

F.

Faikney v. Reynous ..	.. 1[illegible]
Fair v. M'Ivor	.. 3[illegible]
Fairclough v. Pavia ..	154, 1[illegible]
Fairlee v. Herring ..	.. 1[illegible]
Faith v. Richmond ..	.. [illegible]
Fallows v. Taylor ..	.. 1[illegible]
Falmouth (Earl of) v. Roberts	3[illegible]
Fancourt v. Thorne	12, 91, 98, 1[illegible]
Fannin v. Anderson ..	.. 3[illegible]
Fanshawe v. Peet ..	98, 1[illegible]
Farley v. Turner ..	.. 4[illegible]
Farquhar v. Southey ..	198, 3[illegible]
Farquharson v. Cave ..	.. 1[illegible]
Farr v. Ward	.. 3[illegible]
Farrar v. Deflinne ..	.. [illegible]
Farrington v. Lee ..	.. 3[illegible]
Favenc v. Bennett ..	225, 2[illegible]
Fawcett v. Fearne ..	.. 4[illegible]
Fayle v. Bird	87, 2[illegible]
Fearn v. Filica	33, 34, 121, 4[illegible]
——— v. Lewis ..	.. 3[illegible]
Febart v. Stevens ..	.. 4[illegible]
Feise v. Randall ..	.. 1[illegible]
Fenn v. Harrison ..	160, 1[illegible]
Fenton v. Levington ..	.. 3[illegible]
Fentum v. Pococke	8, 129, 196, 2[illegible] 45
Fereday v. Hordern ..	.. [illegible]
Ferguson v. Douglas ..	.. 2[illegible]
Ferrall v. Shaen ..	.. 3[illegible]

PAGE
Ferris v. Bond 94
Fesenmayer v. Adcock 28, 29, 435
Field v. Carr 219, 226
—— v. Woods 14, 15, 77, 111, 117, 322
Fielder v. Marshall 89
Fieldhouse v. Croft .. 9, 177
Fife v. Round 87
Finleyson v. Mackenzie .. 424
Firbank v. Bell 103
Firth v. Thrush .. 282, 297, 421
Fisher v. Beasley 308
——— v. Leslie .. 11, 28, 29
——— v. Mowbray 58
Fitch v. Jones 98, 119, 138, 140
—— v. Sutton .. 196, 227, 232
Fitzgerald v. Williams .. 295
Fleming v. Brooke 9
——— v. Burge 28
——— v. St. John 415
Fletcher v. Braddyl 277
——— v. Dyte 8
——— v. Froggatt 299
——— v. Manning .. 23, 459
——— v. Sandys 208
Flight v. Browne 374
——— v. Gray .. 100, 236
——— v. Maclean 6
——— v. Reed 127, 145, 316
Flint, Ex parte 367
Flood v. Patterson 345
Florence v. Jennings 302
Floyer v. Edwards 307
Fogg v. Sawyer 159
Follett v. Hoppe 443
——— v. Moore .. 91, 315
Forbes v. Marshall 44
——— v. Smith 345
Ford v. Beech .. 235, 236
—— v. Dornford 364
—— v. Olden 61
Fordham v. Wallis .. 349, 352
Forman v. Drew 469
——— v. Wright 425
Forster v. Mackworth 17, 45, 77
——— v. Wilson .. 365, 366
Foster v. Dawber 197
——— v. Green .. 163, 332
——— v. Jolly 99
——— v. Mackinnon .. 327
——— v. Pearson 35, 39, 126, 164
Fowler v. Hendon 281
Fox v. Frith 42, 71, 85
Frampton v. Coulson 215
Francis v. Mott 149
——— v. Nash .. 9, 177
Francis v. Rucker 455
Franklin v. Beesley 469
Franks, Ex parte 64
Fraser v. Jordan 245
——— v. Newton 423
——— v. Welch 426
Freakly v. Fox .. 55, 223
Free v. Hawkins 99, 153, 298
Freeman v. Lomas 360
Frith v. Forbes 184
Fry v. Hill 181
Fryer v. Brown 434
—— v. Gildridge 55
—— v. Roe 340, 435
Fuller v. Smith .. 162, 387
Furze v. Sharwood .. 48, 271, 273
Fussell v. Daniel 315
Fydell v. Clark 160

G.

Gadbury, In re 66
Gale v. Capern .. 354, 357
—— v. Walsh .. 255, 260, 276
Galway v. Mathew .. 7, 47
Gardner v. Baillie 32
——— v. Bruce 341
——— v. M'Mahon 347
——— v. Walsh .. 8, 318, 319, 320
Garnet v. Clarke 126
Garrard v. Cottrell 404
——— v. Woolner 378
Garrett v. Jull .. 8, 244
Gaters v. Madely 65
Gatty v. Field 419
Gay v. Lander 6, 89, 150
Geake v. Jackson 226
Geary v. Physic 75
Geill v. Jeremy .. 280, 282
General Estates Company, re .. 68
George v. Surrey .. 76, 86, 149, 434
——— v. Stanley .. 140, 144
Geralopulo v. Wieler 256, 261, 266, 268
Gibb v. Mather .. 87, 212, 214, 318
Gibbon v. Coggon .. 259, 260, 300
——— v. Scott 193
Gibbs v. Fremont 396
Gibson and Johnson, In re .. 456
——— v. Baghott 351
——— v. Bell 366
——— v. Bruce 134
——— v. Dickie 135
——— v. Hunter 81
Gifford, Ex parte 444

	PAGE
Gilbert *v.* Platt	424
——— *v.* Whitmarsh	100
Giles *v.* Bourn	76
—— *v.* Perkins	462
Gill *v.* Cubitt	163, 371
—— *v.* Lord Chesterfield	2, 402
Gilmore *v.* Whitmarsh	110
Gilpin *v.* Enderby	40, 312
Girardy *v.* Richardson	136
Gladstone *v.* Hadwen	382
Glaister *v.* Hewer	458
Glasfurd *v.* Laing	311, 313
Glendinning, Ex parte	243, 251
Glengall *v.* Edwards	415
Glennie *v.* Edmunds	366
——— *v.* Imrie	131
Glover, Ex parte	447
Glynn *v.* Soares	414
Goate *v.* Goate	347
Godard *v.* Benjamin	404
Goddard *v.* Cox	226
——— *v.* Ingram	352
——— *v.* White	252
Godfrey *v.* Coulman	389
——— *v.* Turnbull	51
Godwin *v.* Culley	347
Goggerly *v.* Cuthbert	156, 405
Golding *v.* Grace	411
Goldsmid, Ex parte	456
——— *v.* Cazenove	447
——— *v.* Hampton	86, 140
Goldsmith *v.* Bland	279
Gompertz *v.* Bartlett	162, 390
Good *v.* Cheeseman	232, 378
—— *v.* Harrison	60
Goodall *v.* Dolley	217, 269, 298
——— *v.* Polhill	267
——— *v.* Ray	168, 169
Goodbody *v.* Foster	25, 305
Goodburn *v.* Marley	139
Goodered *v.* Armour	434
Goodman *v.* Harvey	122, 123, 124, 157, 164, 166, 258, 270, 276
Goodtitle *v.* Milburn	459
Goodwin *v.* Coates	382
——— *v.* Cremer	404
Gordon *v.* Calvert	249
——— *v.* Ellis	46, 224
——— *v.* Sea Fire Society	72
Gore *v.* Gibson	62, 63
Gorgier *v.* Mieville	157, 165, 395
Gorham *v.* Thompson	51
Goss *v.* Nelson	94
Gough *v.* Davis	226
Gould *v.* Coombs	29
——— *v.* Johnson	356, 357
Gould *v.* Robson	24
Gouldney, Ex parte	4
Goupy *v.* Harden	36, 152, 18
Gowan *v.* Forster	349, 35
Graham *v.* Hope	5
——— *v.* Pitman	42
Grange *v.* Trukett	47
Granger *v.* George	34
Grant *v.* Da Costa	84, 8
——— *v.* Hawkes	47, 4
——— *v.* Hunt	19
——— *v.* Mills	38
——— *v.* Vaughan	25, 82, 11 148, 43
——— *v.* Welchman	13
Graves *v.* Key	113, 172, 229, 43
Gray *v.* Mendez	34
—— *v.* Milner	86, 90, 18
Green *v.* Allday	1
——— *v.* Bucknell	44
——— *v.* Croft	22
——— *v.* Davies	80, 11
——— *v.* Deakin	4
——— *v.* Farmer	36
——— *v.* Price	13
——— *v.* Skipworth	7
——— *v.* Steer	151, 44
Greening, Ex parte	15
Greenough *v.* M'Clelland	24
Greenslade *v.* Dower	4
Greenway, Ex parte	376, 44
——— *v.* Hindley	217, 259, 26
Gregory *v.* Fraser	11
——— *v.* Hurrill	34
——— *v.* Parker	35
——— *v.* Walcup	26
Grew *v.* Bevan	13
Grey *v.* Cooper	6
Griffin *v.* Ashby	35
——— *v.* Goff	20
——— *v.* Weathersby	110, 39
Griffith *v.* Roxburgh	42
Griffiths *v.* Owen	37
Grigby *v.* Oakes	1
Groom *v.* Mealey	36
Grosvenor, Ex parte	44
Grout *v.* Enthoven	47, 42
Grove *v.* Neville	6
Grugeon *v.* Smith	27
Grymes *v.* Blofield	23
Guardians of Lichfield Union *v.* Greene	159, 160, 224, 38
Gulliver *v.* Gulliver	34
Gunson *v.* Metz	29
Gurney *v.* Evans	87, 5
——— *v.* Womersley	162, 33

PAGE

Guy v. Harris 11
Guyard v. Sutton 65
Gwinnell v. Herbert .. 147, 148, 424
Gwynne v. Burnell 426

H.

Haddock v. Bury .. 217, 299
Hagedorn v. Reid 277
Hague v. French 76
Haigh v. Jackson 446
——— v. North Bierley Union 68
Halford v. Cameron Coal Company 71, 72
Halifax v. Lyle 199
Hall v. Coates 408
—— v. Cole 243
—— v. Dyson 470
—— v. Featherstone 121
—— v. Franklin 143
—— v. Fuller 25, 332
—— v. Potter 136
—— v. Smith 7, 44
—— v. Wilcox .. 8, 244
Halliday v. Ward 354
Halstead v. Skelton 212
Hamber v. Roberts 434
Hamelin v. Bruck 319
Hamilton v. Bell 461
——— v. Spottiswood .. 79
——— v. Watson 241
Hammersley v. Knowlys .. 226
Hammet v. Yea 310
Hammond v. Dufrene 294
Hamson v. Harrison 460
Hankey v. Cobb 142
——— v. Jones 460
——— v. Smith 367
——— v. Trotman 208
——— v. Wilson 437
Hanley v. Morgan 406
Hansard v. Robinson 228, 373, 374, 376
Hansom, Ex parte 369
Harding v. Edgecumbe .. 352
Hardman v. Bellhouse .. 233
Hardy v. Woodrooffe 87, 213, 214, 216
Hare v. Henty 20, 208
Hargreaves v. Mitchell .. 348
Harley v. Greenwood 447
——— v. Thornton 159
Harmer v. Steele .. 55, 71, 223, 425
Harpham v. Child 275

PAGE

Harries, In re 380
Harrington v. M'Morris .. 419
Harris v. Benson 259
——— v. Boston 310
——— v. Packer 212, 213, 214
——— v. Quine .. 339, 400
——— v. Shipway 380
——— v. Swinburne 410
——— v. Wall 59
——— v. Woolford 343
Harrison, Ex parte 445
——— v. Clifton 77
——— v. Courtauld 243, 251
——— v. Fitzhenry .. 296
——— v. Hannel 314
——— v. Jackson 43
——— v. Richardson .. 62
——— v. Rigby 407
——— v. Ruscoe 275, 276, 284, 285, 287
——— v. Turner 362
Harrop v. Fisher 155
Hart v. King 376
—— v. Nash 350
—— v. Prendergast 347
—— v. Stephens .. 65, 66
Harthey v. O'Flaherty .. 254
Hartley v. Case 223, 271, 272
——— v. Manton 238
——— v. Rice 136
——— v. Wharton 59
——— v. Wilkinson 97
Harvey, Ex parte 251
——— v. Archbold .. 308, 313
——— v. Martin 191
——— v. Mount 61
——— v. Towers 119, 121, 122
Hatch v. Searles 188
——— v. Trays .. 85, 417
Haussoullier v. Hartsink .. 94
Hawkes v. Salter .. 277, 281
Hawkey v. Borwick .. 213, 214
Hawkins v. Billhead 356
——— v. Cardy .. 172, 173,
——— v. Penfold 465
—— v. Rutt 276
——— v. Whitten 365
Hawley v. Beverley 134
Hawse v. Crowe 382
Hay v. Ayling 140, 145
—— v. Goldsmid 32
Haydock v. Lynch .. 93, 95
Haydon v. Williams .. 347, 357
Hayes v. Caulfield 425
Hayling v. Mulhall .. 235, 247
Haynes v. Birks 207, 222, 281

PAGE

Haynes *v.* Foster 85
Healey *v.* Story 71
Heath, Ex parte 292, 293, 295, 444
——— *v.* Hanley 339
——— *v.* Key 244, 247
——— *v.* Percival 53
——— *v.* Sansom 50, 52, 119, 120
Heathcote *v.* Crookshanks .. 232
Hebden *v.* Hartsink 414
Hedger *v.* Steavenson .. 272, 273
Hedley *v.* Bainbridge 45
Heiser *v.* Grout 111
Hemings *v.* Robinson 437
Hemmenway *v.* Stone 7
Hemming *v.* Brook 221
——— *v.* Trenery 323
Hemp *v.* Garland 340
Henderson *v.* Appleton 203, 216
——— *v.* Australian Co. 68
——— *v.* Bise 140
——— *v.* Stobart 231, 233, 238, 246
Henman *v.* Dickinson 323
Henniker *v.* Wigg 126
Henry *v.* Burbidge 422
Henton, Ex parte 456
Hesketh *v.* Fawcitt 229
Hetherington *v.* Kemp .. 277
Hewet *v.* Goodrick 248
Hewit *v.* Kaye .. 20, 176
Hewitt *v.* Thompson .. 277, 297
——— *v.* Price .. 140, 142
Heyhoe *v.* Burge 53
Heywood *v.* Watson 127
Hicks *v.* Duke of Beaufort 299, 421
Higginbotham, Ex parte .. 455
Higgins *v.* Senior .. 37, 71
Higham *v.* Ridgway 437
Highmore *v.* Primrose 85, 350
Hill *v.* Halford .. 93, 94
—— *v.* Heap .. 182, 216, 291, 292
—— *v.* Lewis 82, 147
—— *v.* Manchester and Salford Waterworks Company 68
—— *v.* Royds 464
Hilliard *v.* Lenard 355
Hills *v.* Hills 177
—— *v.* Mitson 470
Hilton *v.* Fairclough 281
——— *v.* Shepherd .. 286, 297
Hindley *v.* Lacey 100
Hindustan, Bank of, *v.* Smith 317
Hine *v.* Allely 213, 214, 216, 282
Hinton *v.* Duff .. 420, 422
Hipwell *v.* Knight 204

PA

Hirschfield *v.* Smith .. 319, 3
Hitchcock *v.* Humfrey 203, 2
——— *v.* Way .. 140, 3
Hoar *v.* Da Costa 2
Hoare *v.* Cazenove 262, 263, 2
——— *v.* Dresser 1
——— *v.* Graham .. 99, 1
Hobbs *v.* Christmas 2
Hodge *v.* Fillis .. 87, 2
Hodges *v.* Steward 4
Hodgins *v.* Hancock 4
Hodgkinson *v.* Wyatt .. 3
Hodgson *v.* Murray .. 170, 4
——— *v.* Shaw 2
——— *v.* Temple 1
Hodson *v.* Gunner 4
Hoffman, Ex parte 4
Hogg *v.* Skene 47, 48, 122, 4
—— *v.* Snaith .. ..
Hoggarth *v.* Taylor 4
Holbrow *v.* Jones 4
——— *v.* Wilkins 2
Holcombe *v.* Lambkin .. 4
Holden's Case 3
Holding, Ex parte 4
Holdsworth *v.* Hunter 195, 386, 3
Holiday *v.* Boas .. ..
Holland *v.* Jourdine 4
——— *v.* Russell .. ..
Holliday *v.* Atkinson 61, 124, 1
Hollier *v.* Eyre .. 243, 2
Hollis *v.* Palmer 3
Holman *v.* Johnson 3
Holme *v.* Barry 1
Holmer *v.* Viner 1
Holmes *v.* Jaques .. 74,
——— *v.* Kerrison .. 78, 3
——— *v.* Kidd 1
——— *v.* Mackrell 115, 350, 4
——— *v.* Sixsmith 1
——— *v.* Williamson .. ..
——— *v.* Wilson 4
Holroyd *v.* Whitehead .. 1
Holt *v.* Miers 99, 3
—— *v.* Ward .. .. ..
Holtier *v.* Eyre .. ..
Holy *v.* Lane .. .. ..
Homan *v.* Thompson 4
Hood *v.* Ashton 4
Hooper *v.* Stevens 3
——— *v.* Williams .. ..
Hopes *v.* Alder 2
Hopley *v.* Dufresne 217, 298, 29 4
Hopper *v.* Richmond 3

PAGE

Hordern v. Dalton 371
Horford v. Wilson .. 298, 300
Horn v. Ion 470
Hornblower v. Proud .. 3, 461
Horncastle v. Farran 383
Horne v. Redfearn .. 11, 28
Horner v. Keppel .. 412, 429
Horsfall v. Fauntleroy .. 382
Hough's Case 331
Houlditch v. Canty 273
Houle v. Baxter 457
Houriet v. Morris 6
Housego v. Cowne 274, 275, 278, 279, 288
Hovil v. Browning 51
Howard v. Baillie 32
——— v. Hodges 136
——— v. Oakes 65
Howcutt v. Bonser 347
Howden v. Haigh 134
Howe v. Bowes .. 202, 214
Howell v. Coleman 407
Hoyles v. Blore 469
Hubbard v. Jackson .. 171, 172
Huber v. Steiner 339, 399, 400
Hubner v. Richardson .. 144
Hudson v. Fossett 302
——— v. Hudson 56
Huffam v. Ellis 214
Hughes v. Wynn 348
Hull v. Wyborn 345
Hulme v. Coles 248
——— v. Muggleston 367
——— v. Sanders 417
——— v. Tenant 64
Hulse v. Hulse 125
Humbert v. Ruding 120
Hume v. Peploe 223, 246, 282, 410
Humphreys v. Jones 347
——— v. Earl of Waldegrave 140
——— v. Willing .. 143
Humphries v. Winslow .. 406
Hunlock v. Blacklowe .. 136
Hunt v. Braines 417
—— v. Massey .. 59, 422
Hunter, Ex parte 25
——— v. Agnew 58
——— v. Wilson 128
Huntley v. Sanderson .. 87, 291
Hustler, Ex parte 445
Hutchinson v. Hargrave .. 406
——— v. Heyworth .. 103
Hutchison v. Bowker 275
Hutton v. Eyre .. 8, 238
——— v. Ward 434

PAGE

Hyde v. Johnson 351
—— v. Skinner 53
Hyne v. Dewdney 11

I.

Ibbett v. Leaver 364
Imeon, Ex parte 92
Immeson, Ex parte 445
Imperial Gas Co. v. London Gas Co. 342
Ingham v. Primrose 187, 196, 332
Ingledew v. Douglas 60
Inglis v. Grant 460
——— v. Haigh .. 339, 348
Ingram v. Foster 183
Innes v. Munro 100
—— v. Stephenson 219
Ireland, Bank of, v. Archer .. 188
——— v. Beresford 129, 243, 245, 455
Irons v. Smallpiece 176
Irving v. Veitch 347, 350, 435
Isaac v. Daniel 245
Isbester, Ex parte .. 161, 445
Israel v. Benjamin 116
—— v. Israel 11, 28

J.

Jacaud v. French 46
Jackson v. Collins 300
——— v. Duchaire 244
——— v. Fairbank 354
——— v. Hudson 187, 195, 257, 262
——— v. Pigott .. 189, 422
——— v. Warwick 128
——— v. Woolley 354
——— v. Yate 406
Jacob v. Hungate 120
Jacobs v. Hart 318, 321
——— v. Tarleton 432
Jacques v. Withy 362
Jacquet v. Jacquet 348
James v. Catherwood 397
——— v. Child 226
——— v. David 232
——— v. Houlditch .. 209, 210
——— v. Isaacs .. 221, 232
——— v. Williams .. 379, 426
Jameson v. Swinton 211, 281, 284, 286
Janson v. Thomas 207

	PAGE
Jardine *v.* Payne ..	113, 435
Jarvis *v.* Wilkins ..	.. 11
Jay *v.* Warren	.. 248
Jeffery *v.* Walton ..	.. 76
Jefferys *v.* Boosey ..	.. 393
——— *v.* Evans ..	.. 144
Jeffries *v.* Austen ..	.. 128
Jelf *v.* Oriel	.. 438
Jenkins *v.* Blizard ..	.. 51
——— *v.* Hutchinson	.. 186
——— *v.* Morris ..	43, 72
——— *v.* Robertson ..	.. 248
Jennings *v.* Newman ..	.. 57
——— *v.* Roberts ..	284, 285
——— *v.* Rundall ..	.. 60
Jenny *v.* Herles ..	.. 95
Jenys *v.* Fawler ..	.. 199
Jeune *v.* Ward	.. 192
Jewell *v.* Parr .. 129,	167, 221, 223
Jobson *v.* Forster ..	.. 57
Jocelyn *v.* Hawkins ..	.. 204
——— *v.* Laserre ..	.. 87
Johnson, Ex parte ..	.. 288
———, In re ..	.. 456
——— *v.* Bann ..	.. 139
——— *v.* Collings ..	.. 188
——— *v.* Gallagher	.. 64
——— *v.* Kennion	173, 220, 221
——— *v.* Marlborough (Duke of)	.. 323
——— *v.* Medlicotte	.. 63
——— *v.* Pye ..	.. 60
——— *v.* Smith ..	339, 342
Johnson *v.* Windle ..	.. 331
Johnstone, Ex parte ..	.. 202
Jolly *v.* Young ..	.. 204
Jombart *v.* Woollett ..	462, 463
Jones, Ex parte ..	.. 310
—— *v.* Broadhurst	221, 222, 232
—— *v.* Brooke ..	.. 404
—— *v.* Corbett ..	47, 424
—— *v.* Darch	.. 199
—— *v.* Fort	.. 157
—— *v.* Hibbert ..	129, 455
—— *v.* Jones .. 127,	131, 320, 433
—— *v.* Lane	173, 179
—— *v.* Lewis	.. 63
—— *v.* Morgan ..	.. 437
—— *v.* Peppercorn ..	.. 165
—— *v.* Ryde ..	160, 162, 333
—— *v.* Ryder ..	115, 350, 435
—— *v.* Scott	348, 349
—— *v.* Simpson ..	.. 103
—— *v.* Smith	.. 123
—— *v.* Thomas ..	.. 119
—— *v.* Yates	.. 46

	PAGE
Joseph *v.* Orme ..	.. 457
Josselyn *v.* Lacier ..	.. 91
Joy *v.* Campbell ..	.. 461
Julian *v.* Shobrooke ..	.. 193
Jungbluth *v.* Way ..	.. 405
Jury *v.* Baker	12, 91

K.

Kay *v.* Duchess de Pienne ..	64
—— *v.* Smith	.. 51
Keable *v.* Payne ..	.. 114
Kearney *v.* King ..	396, 415
——— *v.* West Granada Mining Company ..	.. 386
Kearns *v.* Durell ..	100, 115
Kearslake *v.* Morgan	233, 235, 379, 383
Kearsley *v.* Cole ..	.. 25
Keates *v.* Whieldon ..	.. 107
Keaton *v.* Lynch ..	.. 115
Keene *v.* Beard ..	13, 18, 405
——— *v.* Keene ..	303, 306
Keir *v.* Leman	.. 137
Kell *v.* Nainby	49, 56
Kelly *v.* Solàri	.. 236
—— *v.* Villebois ..	.. 423
Kelner *v.* Baxter ..	.. 31
Kemble *v.* Atkins ..	.. 141
——— *v.* Mills ..	.. 428
Kemp *v.* Balls ..	221, 222, 233
—— *v.* Finden ..	.. 253
—— *v.* Hurry ..	.. 463
—— *v.* Watt	.. 379
Kendrick *v.* Lomax	235, 253, 383, 414
Kennard *v.* Knott ..	245, 248
Kennerly *v.* Nash ..	303, 326
Kennett *v.* Milbank ..	347, 348
Kensington *v.* Chantler	.. 467
Kent *v.* Lowen	277, 433
Kernot *v.* Pittis	143, 470, 477
Kershaw *v.* Cox ..	148, 322
Keesebower *v.* Tims ..	435, 437
Key *v.* Flint	.. 367
Keymer *v.* Laurie ..	19, 196
Kidd *v.* Walker ..	.. 304
Kidson *v.* Dilworth ..	153, 414
Kilby *v.* Wilson ..	.. 382
Kilgour *v.* Finlyson ..	32, 52
Kilsby *v.* Williams	21, 170, 334
Kine *v.* Beaumont ..	.. 277
King, Ex parte ..	454, 457
——, In re	.. 60
—— *v.* Bickley ..	.. 271

	PAGE
King v. Braddon	.. 315
—— v. Gillett	.. 231
—— v. Hoare	8, 234
—— v. Milsom ..	.. 119
—— v. Phillips ..	.. 129
—— v. Taylor	.. 304
—— v. Thom	56, 57
—— v. Walker ..	.. 344
Kingston v. Long ..	.. 93
Kinneraley v. Knott ..	.. 419
——— v. Somers ..	.. 39
Kirby v. Duke of Marlborough	226
Kirk v. Almond ..	.. 406
—— v. Blurton ..	.. 44
—— v. Strickwood ..	.. 137
Kirkpatrick v. Tattersall	.. 465
Kitchen v. Hawkins ..	.. 230
Kitchenman v. Skell ..	.. 57
Knight v. Cambers ..	.. 144
——— v. Clements ..	322, 323
——— v. Criddle ..	9, 177
——— v. Fitch ..	.. 144
——— v. Hunt ..	.. 133
——— v. Pocock ..	.. 408
Knill v. Stockdale ..	.. 418
—— v. Williams ..	.. 319
Knowles v. Burward ..	412, 429
—— v. Mitchell ..	.. 350
Koch v. Shepherd ..	.. 345
Kufh v. Weston ..	.. 276

L.

Lacey v. Forrester ..	.. 425
Lackington v. Combes	.. 365
Lacy v. Kynaston ..	.. 238
—— v. Woolcot ..	.. 53
Lade v. Trill	.. 338
Lafitte v. Slatter	202, 292, 295
Lafond v. Ruddock ..	.. 345
La Foreste, Ex parte ..	.. 454
Laing v. Barclay ..	.. 88
——— v. Stone ..	.. 305
Lake v. Brutton ..	.. 248
Lamb v. Newcomb ..	.. 407
Lambert, Ex parte ..	265, 267
—— —— v. Oakes ..	.. 153
—— —— v. Pack ..	153, 437
Lamey v. Bishop ..	.. 438
Lamprell v. Billericay Union	.. 68
Lananze v. Palmer ..	.. 277
Lane v. Chapman ..	.. 138
—— v. Cotton	.. 370
—— v. Horlock ..	315, 316
—— v. Mullins ..	.. 434

	PAGE
Lane v. Ridley	.. 428
—— v. Williams ..	43, 53
Lang v. Gale	.. 204
—— v. Smyth	.. 386
Langdale v. Parry ..	.. 249
——— v. Trimmer ..	.. 276
Langden v. Stokes ..	.. 231
Langdon v. Hulls	276, 277, 282
—— —— v. Wilson ..	.. 28
Langston v. Corney ..	.. 194
Langton v. Haynes ..	314, 315
——— v. Lazarus ..	.. 322
Lara v. Hacon	.. 100
Latraille v. Hoepfner ..	.. 406
Laveson v. Lane ..	.. 46
Law v. Parnell ..	.. 74
Lawrence v. Clark ..	.. 434
—— —— v. Walmsley	.. 246
Laws v. Rand	.. 20
Lawson v. Lawson ..	.. 176
——— v. Sherwood ..	.. 283
——— v. Weston ..	.. 34
Lawton v. Elmore ..	.. 132
Laxton v. Peat ..	.. 243
Lazarus v. Cowie	113, 117, 167, 168, 171, 221, 223
Leach v. Buchanan ..	.. 200
Leadbitter v. Farrow ..	36, 37
Leaf v. Robson ..	.. 428
Lebel v. Tucker ..	.. 395
Lecaan v. Kirkman ..	.. 298
Le Cheminant v. Pearson	.. 397
Lechmere v. Fletcher ..	126, 347
Lee, Ex parte ..	454, 457, 458
—— v. Lester	.. 361
—— v. Levy	.. 248
—— v. Muggridge ..	.. 64
—— v. Rogers	.. 356
—— v. Wilmot ..	.. 347
—— v. Zagury ..	.. 34
Leeds Bank, Ex parte	.. 462
Leeds Banking Co., In re	261, 282
—— v. Lancashire ..	92, 95, 97
Leers, Ex parte ..	.. 456
Leeson v. Holt ..	.. 51
——— v. Piggott ..	.. 216
Lefevre v. Lloyd ..	.. 36
Leftley v. Bailey ..	.. 182
——— v. Mills	222, 258, 282
Legge v. Thorpe	259, 294, 295
Leicester v. Rose ..	.. 133
Leigh v. Baker ..	408, 409
Lemere v. Elliott ..	.. 350
Leonard v. Baker ..	.. 469
——— v. Wilson ..	150, 261
Leroux v. Browne ..	.. 400

PAGE

Leslie v. Hastings 86
Leveck v. Shafto 49
Le Veux v. Berkeley 345
Levy v. Baker 62
—— v. Dolbell 469
—— v. Horne 468
—— v. Webb .. 407, 419
Lewin v. Edwards 417
Lewis v. Cosgrave 132
—— v. Dalrymple 411
—— v. Gomperts 272, 273, 406, 407
—— v. Lee 63
—— v. Lyster 232
—— v. Mason 469
—— v. Nicholson 38
—— v. Parker, Lady 170
—— v. Reilly 52
—— v. Sapio 434
Leykrieff v. Ashford 323
Lichfield Union (Guardians of) v. Greene 159, 160, 224, 383
Lickbarrow v. Mason 219
Lightbody v. Ontario Bank .. 159
Lindo v. Unsworth 283
Lindus v. Bradwell .. 37, 186
——— v. Melrose .. 71, 73
Linsell v. Bonsor .. 347, 352
Lisle v. Liddle 405
Lithgow v. Lyan .. 303, 304
Little v. Slackford 79
Littlefield v. Shee 64
Litton v. Dalton 468
Liverpool Association v. Fairhurst 63
——— Borough Bank v. Walker 57
Llewellyn v. Llewellyn .. 233
——— v. Winckworth .. 33
Lloyd, Ex parte 446
—— v. Archbowl 49
—— v. Ashby 49
—— v. Howard .. 151, 425
—— v. Lee 64
—— v. Maund 351
—— v. Oliver 90
—— v. Sandilands .. 23, 24
Load v. Green 461
Lobb v. Stanley 465
Lobbon, Ex parte 447
Lockett's Case 327
Lockier v. Smith 56
Lockwood v. Ewer 175
Lockyer v. Jones 10
Lomas v. Bradshaw .. 43, 131
Lomax v. Landells 419

PAGE

London and Birmingham Bank, In re 2
Long v. Bailie 3
—— v. Greville 3
Longridge v. D'Orville .. 2
Lord v. Ferrand 2
—— v. Hall 1
Loring, Ex parte 3
Lovell v. Hill 1
——— v. Martin .. 220, 3
Low v. Burrows 4
—— v. Copestake 1
Lowe v. Peers 1
—— v. Peskett .. 236, 2
Lowes v. Mazzaredo 3
Lowndes v. Collins .. 303, 3
Lowry v. Murrell 1
Lucas v. Winton .. 468, 4
Luce v. Irwin 4
Ludlow (Mayor of) v. Charlton
Lumley v. Hudson 2
——— v. Musgrave 236, 305, 3
——— v. Palmer 1
Lundie v. Robertson 217, 298, 29
300, 4
Lynn v. Bruce 2
Lyon v. Holt 213, 2
—— v. Home 6
Lysaght v. Bryant .. 151, 2

M.

Maber v. Maber 3
Macartney v. Graham .. 3
Machell v. Kinnear 1
Machu v. Fraser .. 406, 4
Mackay v. Judkins 2
Mackintosh v. Haydon 214, 2
318, 3
Mackworth v. Marshall .. 1
Maclae v. Sutherland 7, 8, 44, 7
Macleod v. Snee 9
MacNeilage v. Holloway .. 6
M'Allister v. Haden 1
M'Call v. Taylor .. 86, 9
M'Donald v. Bell 2
——— v. Bovington .. 4
M'Donnell v. Murray 3
M'Dowall v. Boyd .. 322, 3
——— v. Lyster 1
M'Gae, Ex parte 4
M'Gregor v. Rhodes 154, 220, 4
M'Kinnell v. Robinson 139, 1

	PAGE
M'Nair *v.* Fleming ..	.. 48
M'Neilage *v.* Holloway	.. 459
M'Reth *v.* Simmons ..	.. 384
M'Taggart *v.* Ellice ..	.. 406
Maddock's Case ..	.. 326
Maghee *v.* O'Neil ..	.. 355
Magnus, Ex parte ..	.. 459
Magor *v.* Hammond ..	.. 90
Mahoney *v.* Ashlin ..	.. 389
Maillard *v.* Duke of Argyle	.. 379
Main's Case	.. 203
Mainwaring *v.* Newman	7, 41, 89
Maitland *v.* Irving ..	.. 61
Maldow *v.* Caldwell ..	.. 6
Mallan *v.* May	.. 136
Malpas *v.* Clements ..	438, 459
Maltass *v.* Siddle ..	216, 293
Maltby *v.* Murrells ..	408, 409
Mammatt *v.* Mathew ..	.. 407
Manby *v.* Scott ..	.. 60
Manchester Warehouse Co. *v.* Bertie	.. 221
Manley *v.* Boycott ..	8, 244
Mann *v.* Lent	120, 131
—— *v.* Moors	.. 276
Manners, Ex parte ..	.. 445
Manwaring *v.* Harrison	.. 208
March *v.* Attorney-General	.. 315
—— *v.* Ward	..7, 44
Mardall *v.* Thellusson	.. 368
Mare *v.* Charles ..	.. 37
Margetson *v.* Aitkin ..	249, 298
Markham *v.* Gonaston	.. 317
Markle *v.* Hatfield ..	.. 162
Marlar, Ex parte ..	.. 455
Marriage *v.* Skiggs ..	.. 409
Marryatts *v.* White ..	.. 226
Marsh *v.* Chambers ..	.. 364
—— *v.* Houlditch ..	.. 226
—— *v.* Martindale ..	309, 313
—— *v.* Maxwell	281, 286, 287, 300
—— *v.* Newall ..	.. 173
—— *v.* Pedder	..24, 380, 381
Marshall, Ex parte ..	.. 404
—— *v.* Broadhurst	.. 56
—— *v.* Poole ..	303, 305
—— *v.* Rutton ..	.. 63
Marston *v.* Allen ..	2, 151, 425
Martin *v.* Chauntry ..	.. 91
—— *v.* Morgan ..	.. 16
—— *v.* Pewtress ..	.. 466
—— *v.* Reed ..	.. 175
Marzetti *v.* Williams ..	18, 222
Mason *v.* Barff ..	.. 191
—— *v.* Bradley ..	.. 323
Mason *v.* Hunt ..	.. 188
—— *v.* Morgan ..	.. 65
—— *v.* Rumsey ..	43, 44
Master *v.* Miller ..	318, 323
Masterman *v.* Cowrie ..	310, 311
Masters *v.* Barretto ..	.. 214
—— *v.* Ibberson ..	.. 144
Mather, Ex parte ..	.. 444
—— *v.* Lord Maidstone	119, 335
—— *v.* Marsland ..	.. 409
Mathews *v.* Bloxam ..	.. 147
Matthews *v.* Griffiths ..	.. 310
—— *v.* Haydon ..	.. 202
—— *v.* Phillips ..	.. 342
Maude, Ex parte ..	.. 457
Maugham *v.* Hubbard	113, 229
Mavor *v.* Pyne ..	.. 338
Mawman *v.* Gillett ..	.. 49
Maxwell *v.* Brain ..	.. 275
May *v.* Seyler ..	.. 429
Mayer *v.* Jadis ..	.. 154
Mayhew *v.* Crickett	235, 244, 247, 248, 252, 253
Mayor *v.* Johnson ..	.. 375
Mayor of Ludlow *v.* Charlton	68
—— Stafford *v.* Till ..	68
Mead *v.* Braham	446, 447, 457
—— *v.* Young	80, 165, 328
Meggadow *v.* Holt ..	.. 420
Magginson *v.* Harper	73, 80, 341, 354
Meggott *v.* Mills ..	.. 226
Melanotte *v.* Teasdale	.. 29
Mellersh *v.* Rippen ..	.. 275
Mellish *v.* Rawdon ..	181, 182
—— *v.* Simeon ..	.. 413
Mendizabal *v.* Machado	190, 193
Mercer *v.* Cheese ..	.. 379
—— *v.* Jones ..	.. 304
—— *v.* Southwell ..	.. 188
Merchants' Bank *v.* Birch	.. 288
Mertens *v.* Winnington	.. 267
Merton's Case	.. 326
Messenger *v.* Southey ..	272, 275
Metcalfe, Ex parte ..	.. 453
—— *v.* Richardson	270, 421
Michael *v.* Myers ..	235, 245
Middleton *v.* Barned ..	.. 129
—— *v.* Lord Onslow	.. 244
Midford *v.* Finden ..	.. 429
Miers *v.* Brown ..	271, 284
Miley *v.* Walls ..	.. 427
Millar *v.* Heinrick ..	.. 397
Miller *v.* Atlee ..	.. 364
Miller *v.* Biddle ..	.. 207
—— *v.* Hay	.. 419

PAGE

Miller v. Miller .. 9, 176
——— v. Race 9, 34, 395
——— v. Thompson .. 1, 91, 185
Mills v. Aldenbury Union .. 253
—— v. Barber 120
—— v. Fowkes .. 226, 349
—— v. Gibson 300
—— v. Oddy .. 131, 425, 431
—— v. Stafford 10
Milne's Case 330
Milne v. Graham 6
—— v. Prest 188
Milnes v. Dawson .. 124, 125
Minet v. Gibson .. 80, 81
Mitchel v. Reynolds 136
Mitchell v. Baring .. 256, 263
Mitchinson v. Hewson 66, 353
Mitford v. Finden 412
Moffatt v. Edwards 11
——— v. Van Millingen 7, 41, 89
Mogadara v. Holt 291
Mogg v. Baker 466
Moggeridge v. Jones 131
Moline, Ex parte 222, 282, 288
Molloy v. Delves .. 86, 188
Molton v. Camroux .. 62, 63
Mondel v. Steele 410
Monk v. Sharp 442
Montague v. Perkins 187
Moor v. Withy 190
Moore, Ex parte 455
——— v. Barthrop 28
——— v. Bushell 464
——— v. Darton 177
——— v. Manning .. 150, 159
——— v. Petchell 348
——— v. Strong 350
——— v. Vanlute 91
——— v. Warren .. 161, 208
——— v. Wright 364
Morgan v. Brundrett 466
——— v. Davison 211
——— v. Jones 435
——— v. Richardson 131
Morice v. Lee 94
Morley v. Culverwell 42, 113, 223, 427
——— v. Inglis 361
Morrell v. Frith 348
Morris v. Dixon 350
——— v. Lee 10, 79, 135
——— v. Norfolk 353
——— v. Walker 156
Morrison v. Buchanan 183
Morse v. Wilson 312
Mortimer v. M'Callan .. 141, 142

PAGE

Moseley v. Hanford 99
Moss v. Hall .. 236, 245, 247
Mossop v. Eaden .. 375, 376
Mott v. Hicks 152
Moule v. Brown .. 19, 20, 208
Mountford v. Harper 24
Mountstephen v. Brooke 354, 420
Moxon v. Pulling 155
Muilman v. D'Eguino 181, 182, 278
Mullett v. Hutchison 28
Mullick v. Radakissen .. 181
Munroe v. Bordier 128
Murray v. East India Company 32, 54, 68, 340
——— v. Glasse .. 4, 64
——— v. King .. 291, 292
——— v. Reeves 470
——— v. Stair (Earl of) .. 99
Murrow v. Stuart 157
Musgrave v. Drake .. 48, 424
Mutford v. Walcot .. 189, 262
Mutual Loan Fund v. Sudlow .. 244

N.

Nadin v. Battie 249
Naoroji v. Chartered Bank of India 366
Napier v. Schneider 413
Nash v. Brown 124
—— v. Duncomb .. 113, 435
—— v. Hodgson .. 226, 349
Natal Investment Company, In re 67
National Savings Bank v. Tranah 403
Neale v. Ovington 420
—— v. Proctor 428
—— v. Turton .. 42, 43
Nedham's Case .. 55, 56
Nelson v. Serle 57, 127
——— v. Stocker 60
Nerot v. Wallace 137
Nevison v. Whitley 311
New v. Swain 388
Newen v. Gill 285
Newmarch v. Clay 52
Newsome v. Coles .. 36, 51, 58
Newton v. Chorlton 252
New Zealand Banking Company, In re 468
Nias v. Nicholson 469
Nichols v. Bowes 214
——— v. Diamond .. 72, 73, 186
——— v. Norris .. 243, 251

	PAGE
Nicholson *v.* Cooch	442
——— *v.* Gouthit	202
——— *v.* Revill ..	238, 252
——— *v.* Ricketts ..	43, 44, 190
Nightingale *v.* Adams ..	344
——— *v.* Withington ..	60
Nisbett *v.* Smith	244
Nixon *v.* Phillips	314
Noble *v.* Adams	382
Noel *v.* Boyd	427
—— *v.* Rich	427
Nordenstrom *v.* Pitt	306
Norman *v.* Booth	442
Norris *v.* Aylett ..	234, 250
——— *v.* Solomon ..	91, 103
——— *v.* Solomonson ..	299
North *v.* Wakefield	251
North British Insurance Co. *v.* Lloyd	241
Northam *v.* Latouche	470
Norton *v.* Ellam	215
——— *v.* Pickering	293
——— *v.* Seymour	44
Norwich Navigation Company *v.* Theobald	51
Novelli *v.* Rossi ..	154, 196
Noyes *v.* Price	10
Nye *v.* Moseley	185

O.

Oakley *v.* Ooddeen	122, 123, 124
——— *v.* Rigby	140
Obbard *v.* Betham	76, 131, 459
Ockenden, Ex parte	366
Offord *v.* Davis	254
O'Keefe *v.* Dunn ..	167, 270
Ord *v.* Fenwick	56
——*v.* Portal	149
Orme *v.* Young	245
Orr *v.* Maginnis	255, 256, 294
—— *v.* Union Bank of Scotland	332
Orridge *v.* Sherborn ..	7, 207
Osbaldiston *v.* Simpson ..	179
Osborn *v.* Donald	156
Oughterlony *v.* Easterby ..	364
Ould *v.* Harrison ..	140, 168
Outhwaite *v.* Luntley	192, 319, 320, 321
Overend, Gurney & Co. *v.* Mid-Wales Railway	68
Owen *v.* Homan ..	241, 251
—— *v.* Pizey	198
—— *v.* Von Uster	186
—— *v.* Waters ..	419, 421
Owen *v.* Wilkinson	8
Owens *v.* Porter	143
Owenson *v.* Morse	10, 160, 382

P.

Pack *v.* Alexander	276
Padwick *v.* Turner	422
Page, Ex parte	458
—— *v.* Wiple	404
Paine *v.* Guardians of the Strand Union	68
Palethorpe *v.* Furnish	351
Paley *v.* Field	227
Palfrey *v.* Baker	380
Palliser *v.* Ord	36
Palmer's Case	329
Palmer *v.* Pratt	93
Par, Ex parte	456
Parker *v.* Boughey	74
——— *v.* Gordon	182, 207, 210, 276
——— *v.* Hutchinson	304
——— *v.* Leigh	198
Parkin *v.* Moon	170
Parks *v.* Edge ..	212, 213, 438
Parmiter *v.* Parmiter	350
Parnther *v.* Gaitskell	344
Parr *v.* Jewell	171
Parry *v.* Nicholson	323
Parsons *v.* Alexander	139
Partridge *v.* Bank of England	164
Passmore *v.* North ..	77, 166
Paterson *v.* Hardacre ..	119, 120
——— *v.* Zachariah	51
Paton, Ex parte	455
Patterson *v.* Beecher ..	259, 260
Paul *v.* Joel	274
Payler *v.* Homersham ..	133, 238
Payne *v.* Jenkins	28
Peacock's Case	328
Peacock *v.* Jeffrey	362
——— *v.* Murrell	116
——— *v.* Pursell ..	286, 379
——— *v.* Rhodes	149
Pearce *v.* Davis	23, 435, 436
Pearl *v.* Deacon ..	243, 247
Pearse *v.* Pemberthy	299
Pearson *v.* Crallan	278
——— *v.* Garrett	92
Pease, Ex parte	462
——— *v.* Hirst	126, 224
Peddell *v.* Gwynn	72
Pellecat *v.* Angell	397
Pemberton *v.* Shelton	417
——— *v.* Vaughan	186

	PAGE
Penkivil *v.* Connell	71
Pennell *v.* Stephens	443
Penny *v.* Innes ..	147, 151
Penrose *v.* Martyr	73
Pentz *v.* Stanton	37
Perceval *v.* Framplin	39
Percival *v.* Frampton ..	120, 126
Perfect *v.* Musgrave ..	8, 244
Perham *v.* Raynal ..	352, 354
Perreira *v.* Jopp ..	195, 386
Perring *v.* Hone	44
Perris *v.* Roberts	227
Perry *v.* Atwood	233
—— *v.* Jackson	345
Peru Railway Co., Re	68, 72
Peters *v.* Anderson	226
—— *v.* Brown	354
Peto *v.* Reynolds 6, 86, 89,	91, 186
Petre *v.* Duncombe	253
—— *v.* Hannay	141
Pfiel *v.* Vanbatenberg	223, 229
Philips, Ex parte	457
—— *v.* Astling	291
Phillips *v.* Allan	395
—— *v.* Cockayne	309
—— *v.* Cole..	432
—— *v.* Donn	407
—— *v.* Gould ..	270, 272
—— *v.* Im Thurn	81, 199, 200, 265
—— *v.* Phillips	347
—— *v.* Pickford	468
—— *v.* Turner	406
—— *v.* Warren	437
Philliskirk *v.* Pluckwell ..	66
Philpot *v.* Aslett	470
—— *v.* Bryant	213, 245, 247
Phipps *v.* Tanner	83
Phipson *v.* Kneller ..	99, 292
Pickard *v.* Banks	10
Pickin *v.* Graham	285, 299, 301
Pidcock *v.* Bishop ..	184, 244
Pierce *v.* Fothergill	304
Pierson *v.* Dunlop ..	188, 221
—— *v.* Hutchinson.. ..	373
Pigott *v.* Cubley	174
Pike *v.* Stephens	448
—— *v.* Street	99, 152
Pillans *v.* Van Mierop	188, 262
Pinard *v.* Klockman	386
Pinkerton *v.* Marshall.. ..	464
Pinkney *v.* Hall	43
Pinkus *v.* Peters	179
Pitt *v.* Chappelow ..	199, 465
—— *v.* Purssord	252
Pittam *v.* Foster	353
Plimley *v.* Westley	114, 147, 148, 298
Plomer *v.* Long	226
Pocklington *v.* Sylvester	19, 208
Pocock *v.* Billing	432
Poirier *v.* Morris	126, 128, 162
Poland *v.* Glynn	466
Pole *v.* Ford	235, 248
Polglass *v.* Oliver	10
Polhill *v.* Walter ..	88, 186
Pollard *v.* Ogden	172, 222, 334, 335
Pollock *v.* Turnock	409
Pontifex *v.* Jolly	431
Poole *v.* Smith..	374
Pooley *v.* Brown 110,	161, 162, 333
—— *v.* Harradine	244
Popplewell *v.* Wilson	84, 126, 129
Porthouse *v.* Parker	199, 289, 297
Portugal (Queen of) *v.* Glynn	414
Potez *v.* Glossop ..	77, 459
Pott *v.* Beavan	455
—— *v.* Clegg	350, 435
—— *v.* Eyton	40
Potter *v.* Brown	394
—— *v.* Rayworth	299
Powell *v.* Ancell	417
—— *v.* Eason	469
—— *v.* Ford	434
—— *v.* Graham	58
—— *v.* Hellicar	176
—— *v.* Jones	191
—— *v.* Monnier	190, 191, 376
—— *v.* Roche ..	224, 228
Powles *v.* Hargreaves.. ..	464
—— *v.* Page ..	72, 289
Prescott, Ex parte	366
—— *v.* Flinn	33
—— *v.* Levi	429
Preston *v.* Jackson ..	144, 314
Prestwick *v.* Marshall.. ..	65
Price *v.* Barker ..	238, 246
—— *v.* Easton..	422
—— *v.* Edmunds	8, 243, 244, 246, 248
—— *v.* Green	136
—— *v.* Hewitt..	60
—— *v.* Mitchell ..	87, 214
—— *v.* Neal	199, 333
—— *v.* Price ..	373, 374, 379
—— *v.* Taylor.. ..	37, 73
—— *v.* Earl of Torrington ..	437
Priddy *v.* Hendry ..	85, 417
Prideaux *v.* Collier	216, 292, 299
—— *v.* Webber	344
Prince *v.* Brunatte ..	65, 199

	PAGE
Prince v. Heylin ..	.. 339
Pring v. Clarkson ..	.. 250
Prior v. Henbrow ..	.. 9
Prothero v. Phelps ..	414, 415
Pruessing v. Ing ..	.. 116
Puckford v. Maxwell ..	.. 382
Puckle v. Moor ..	.. 356
Puget de Bras v. Forbes	.. 128
Pugh v. Hookham ..	.. 469
Purdon v. Purdon ..	.. 350
Putnam v. Sullivan ..	.. 62
Purssord v. Peek ..	.. 428
Pym v. Campbell ..	.. 100

Q.

Quantock v. England ..	.. 338
Quarrier v. Colston ..	29, 395

R.

Rabey v. Gilbert ..	299, 300
Rackham v. Marriott ..	.. 347
Raikes v. Todd ..	.. 227
Railton v. Matthews ..	.. 241
Ralli v. Dennistoun	195, 388, 394
—— v. Sarrell	.. 194
Ramsbottom v. Cator ..	157, 464
Ramsey v. Eaton ..	.. 443
Ramuz v. Crowe ..	373, 374
Randall v. Moon ..	.. 221
——— v. Trimen ..	.. 38
Ranelagh (Lord) v. Champante	313
Ranklin v. Weguelin ..	176, 177
Raper v. Birkbeck ..	154, 196
Raphael v. Bank of England	84, 164, 166
Rapp v. Allnutt ..	.. 115
Rathbone, Ex parte ..	.. 445
Rawlings v. Hall ..	.. 415
Rawlinson v. Stone ..	.. 54
Rawson, Ex parte ..	.. 451
Rayner v. Fussey ..	244, 245
——— v. Grote ..	.. 37
Raynes v. Jones ..	.. 470
Read, Ex parte 450, 454,	442, 444
—— v. Gamble ..	.. 434
Reader, Ex parte ..	.. 457
Redmayne v. Burton	375, 377, 367
Reed v. Deere	.. 114
—— v. White	199, 381
Rees v. Abbott ..	.. 420
—— v. Berrington ..	244, 247
—— v. Warwick ..	.. 191
Rees v. Watts	.. 363
Reeves v. Hearn ..	.. 232
——— v. Lambert ..	.. 469
——— v. Mackay ..	.. 469
Reg. v. Bartlett ..	.. 91
—— v. Bigge	.. 150
—— v. Blenkinsop ..	327, 329
—— v. Butterwick ..	.. 326
—— v. Chawton ..	.. 204
—— v. Cook	330, 331
—— v. Danger ..	.. 326
—— v. Gompertz ..	.. 114
—— v. Green	.. 331
—— v. Hill	.. 329
—— v. Ion	.. 329
—— v. Kinnear ..	91, 185
—— v. Morrison ..	.. 178
—— v. Oddy	.. 331
—— v. Perry	.. 16
—— v. Radford ..	.. 329
—— v. Radley ..	.. 466
—— v. Rogers	.. 327
—— v. Turpin	.. 326
—— v. White ..	325, 326, 329
—— v. Wilson ..	.. 327
Regil v. Green ..	.. 428
Reid v. Croft	.. 470
—— v. Dickons ..	.. 351
—— v. Furnival ..	173, 221
Renew v. Axton ..	.. 348
Rew v. Pettet	37, 73, 351
Rex v. Bingley ..	.. 330
—— v. Birkett ..	329, 330
—— v. Bontien ..	.. 328
—— v. Box	.. 82
—— v. Bullock ..	.. 442
—— v. Burke	.. 326
—— v. Craven	.. 330
—— v. Dade	.. 330
—— v. Davis	.. 325
—— v. Dick	.. 331
—— v. Dunn	.. 327
—— v. Edwards ..	.. 326
—— v. Elsworth ..	.. 329
—— v. Francis ..	.. 327
—— v. Hales	.. 327
—— v. Hart	.. 327
—— v. Hawkswood ..	114, 326
—— v. Hevey	.. 329
—— v. Holt	.. 51
—— v. Hunter ..	87, 90
—— v. Johnson ..	.. 277
—— v. Jones	.. 326
—— v. Kirkwood ..	.. 330
—— v. Lambton ..	.. 151
—— v. Lee	.. 326

PAGE

Rex v. London, Sheriffs of .. 411
—— v. M'Kay 331
—— v. Millard 331
—— v. Moffat 326
—— v. Morris 329, 330
—— v. Parkes 328
—— v. Pateman 326
—— v. Peacock 322, 323, 331
—— v. Phipoe 326
—— v. Plumer 277
—— v. Pooley 15
—— v. Port 83
—— v. Post 326, 329
—— v. Randall .. 80, 326
—— v. Revett 135
—— v. Richards .. 80, 326
—— v. Shukard 329
—— v. Teague .. 114, 329
—— v. Treble 329
—— v. Watson 277
—— v. Westbeer 178
—— v. Watts 328
—— v. Wilcox 326
—— v. Yates 15
Reynolds v. Bowley 50, 461, 463
—— v. Davies 421
—— v. Doyle .. 130, 342
—— v. Hankin 407
—— v. Peto .. 6, 191
—— v. Wheeler .. 8, 244, 253
Rhode v. Proctor 288
Rhodes, Ex parte 155
—— v. Bate 61
—— v. Gent 215
—— v. Smethurst .. 343, 346
Rhymes v. Clarkson 76
Rice v. Stearns 152
Richards v. Frankum .. 100, 433
—— v. James 362
—— v. Macey .. 89, 126
—— v. Richards 42, 65, 66, 94, 303
—— v. Thomas 99
Richardson v. Bradshaw .. 460
—— v. Jackson .. 411
—— v. Mellish 136, 137
Richmond v. Heapy .. 46, 458
Rickford v. Ridge .. 19, 20, 208
Ridley v. Blackett 24
—— v. Plymouth Company 72
—— v. Taylor .. 43, 47
—— v. Tindall 427
Ridout v. Bristow 57, 85, 99, 126
Ritchie v. Van Gelder .. 439
Roach v. Johnston 212
—— v. Ostler .. 90, 91

PAGE

Roach v. Thompson 404
Robarts v. Tucker 185, 219, 220
Roberts, Ex parte 445
—— v. Bethell 189
—— v. Bradshaw 277
—— v. Eden .. 157, 171
—— v. Elsworth 410
—— v. Peake 92
—— v. Roberts 136
—— v. Trenayne .. 312, 314
Robertson v. Goss 444
—— v. Kensington .. 153
—— v. Sheward .. 73, 80
Robins v. Gibson .. 258, 276
—— v. Maidstone 121, 230, 433
—— v. May 93
Robinson, Ex parte 445
—— v. Bland 87, 90, 144, 304, 393
—— v. Cotterell 408
—— v. Hawksford 20, 210
—— v. Little 151
—— v. Read 250, 380, 381
—— v. Reynolds 128
—— v. Yarrow .. 34, 200
Robson v. Bennett 19, 21, 190, 208, 282
—— v. Curlewis 274
—— v. Oliver 160, 203, 216
—— v. Rolls 157
Roche v. Campbell 87
Roden v. Ryde 433
Rodrick v. Hovill 115
Rofey, Ex parte 444
Roffey v. Greenwell .. 94, 303
Rogers, Ex parte 457
—— v. Chilton 426
—— v. Flook 436
—— v. Hadley .. 100, 131
—— v. Hunt .. 258, 414
—— v. Kingston 470
—— v. Langford 159, 160, 161, 162, 203, 216
—— v. Stephens 255, 276, 298
Rogerson v. Hare 285
Rolfe v. Caslon 448
Rolin v. Steward 19, 185, 222
Rolleston v. Dixon 423
—— v. Hibbert 155
Rolt v. Watson 374
Romberg v. Falkland Islands Company 404
Romellio v. Hallaghan .. 469
Rooman v. Nash 447
Roscow v. Hardy .. 270, 300
Rose v. Bowler 57

	PAGE
Rose v. Hart	366
—— v. Main	142, 444
—— v. Poulton	42
—— v. Rowcroft ..	76, 459
—— v. Sims ..	125, 155, 366
—— v. Tomlinson	115
Rosewarne v. Billing	144
Rosher v. Kieran	285
Ross, Ex parte	369
Rossiter v. Rossiter	32
Rotch v. Edie	397
Rothery v. Munnings	348
Rothschild v. Barnes	400
———— v. Corney ..	169
———— v. Currie 393, 396,	400
Rothwell v. Timbrell	443
Rouse v. Redwood	298
Rowe v. Hopwood	347
—— v. Tipper.. 285, 286,	287
—— v. Young.. 192, 211,	214
Rowlands v. Sprinjett ..	275
Rowley v. Horne	51
Rowning v. Goodchild ..	371
Rowton, Ex parte	462
Royal Bank of Scotland, Ex parte The	456
Royal British Bank v. Turquand	72
Rucker v. Hannay	351
——— v. Hiller	295
Rudder v. Price	417
Ruff v. Webb	79
Rufford, Ex parte	457
Rumball v. Ball .. 215,	341
Rushton v. Aspinall	420
Rushworth, Ex parte	457
Russell v. Bell.. .. 366,	367
——— v. Hankey .. 24,	224
——— v. Langstaffe 86, 166, 188,	202, 297
——— v. Lee	58
——— v. Phillips .. 184,	194
——— v. Pollett	45
——— v. Powell .. 79,	95
Rust v. Cooper..	466
Ryall v. Rolle 3,	460
Ryder v. Ellis	403

S.

Sadi and Morris's Case ..	3
Sadler v. Nixon	8
Sainsbury v. Parkinson ..	2
Sainter v. Ferguson	186
Salmon v. Webb .. 100,	236
Sampson v. Burton	366

	PAGE
Sanders v. Blane	57
Sanderson v. Collman	430
Sands v. Clarke .. 203,	216
Sard v. Rhodes .. 232,	233
Sargeant, Ex parte	462
Sarratt v. Austin .. 449,	458
Saul v. Jones 212,	216
Saunderson v. Bowes .. 87,	214
———— v. Griffiths ..	32
———— v. Jackson ..	86
———— v. Judge .. 212,	276
———— v. Piper	82
Savage v. Aldren .. 153,	340
Sayer v. Chator	7
—— v. Wagstaff	380
Scales v. Jacob	347
Scarpellini v. Atcheson 65, 66,	389
Schild v. Kilpin	422
Schofield v. Bayard	264
Scholey v. Ramsbottom ..	220
——— v. Walsby .. 229,	437
——— v. Walton .. 349,	352
Schulz v. Astley 166, 167, 188,	418
Scott v. Ebury (Lord) ..	38
—— v. Gilmore ..	143, 144
—— v. Lifford.. .. 237,	281
—— v. Lord Seymour ..	400
Scruggs v. Gass	159
Sea Fire and Life Society, In re	72
Searles v. Sadgrove	229
Sebag v. Abitbol	192
Secar v. Atkinson	57
Selby v. Eden 87,	211
Semple v. Cole.. .. 318,	328
——— v. Cornwall	314
Sentence v. Poole	62
Serle v. Norton .. 20,	77
—— v. Waterworth .. 57,	127
Serrell v. Derbyshire Rail. Co.	169
Sewell v. Dale	423
—— v. Evans..	433
Sharp v. Bailey .. 87,	296
—— v. Gye	469
—— v. Lethbridge	411
Sharpe v. Gibbs	234
Sharples v. Rickard	110
Sharratt, Ex parte	467
Shaw v. Broom	432
—— v. Croft	285
—— v. Harvey	400
—— v. Picton..	226
Shearm v. Burnard	434
Sheerman v. Thompson ..	470
Shelton v. Braithwaite 213, 274,	275, 279
Shenton v. James	93

	PAGE
Shepherd *v.* Shepherd	422
Sheppard's Case	328
Sheppard *v.* Dry	44
Sherrington *v.* Yates	66
Shillito *v.* Theed	139
Shirley *v.* Jacobs	406
Shirreff *v.* Wilks	48
Shortland, Ex parte	467
Shrubsole *v.* Sussams	442
Shute *v.* Robins	181, 209, 210
Shuttleworth, Ex parte	160
——— *v.* Stephens	87, 90
Sibley *v.* Fisher	323
Sibree *v.* Tripp	11, 233, 378
Siddall *v.* Rawcliffe	418
Sidford *v.* Chambers	154, 437
Siffkin *v.* Walker	43
Sigell *v.* Jebb	138
Siggers *v.* Brown	277, 297
——— *v.* Lewis	223, 246, 411
——— *v.* Nichols	194
Sigourney *v.* Lloyd	158
Simmonds *v.* Parminter	419
Simmons *v.* Taylor	22
Simons *v.* Johnson	238
Simpkins *v.* Potecary	417
Simpson, Ex parte	466
——— *v.* Bloss	135
——— *v.* Clarke	119
——— *v.* Dick	406
——— *v.* Egginton	222
——— *v.* Margitson	204
——— *v.* Pogson	468, 470
——— *v.* Stackhouse	324
Sims *v.* Simpson	368
Simson *v.* Ingham	226
Sinclair *v.* Baggaley	76, 459
Siordet *v.* Kuczynski	117
Skelton *v.* Watt	469
Skilbeck *v.* Garbett	276, 277
Skinner *v.* Stocks	49
Skip *v.* Hucy	244
Slade's Case	3
Slater *v.* Lawson	352
Sleigh *v.* Sleigh	292
Slipper *v.* Stidstone	363
Sloman *v.* Cox	236, 322
Smallwood *v.* Vernon	147
Smart *v.* Nokes	113
——— *v.* Rayner	431
Smith, Ex parte	249, 444, 456
——— *v.* Abbott	193
——— *v.* Ball	418
——— *v.* Battens	76, 356, 459
——— *v.* Bellamy	214, 216
——— *v.* Boheme	91
Smith *v.* Braine	121
——— *v.* Bromley	133
——— *v.* Buchanan	395
——— *v.* Caren	177
——— *v.* Chester	200
——— *v.* Clarke	150
——— *v.* Clench	428
——— *v.* Cox	422
——— *v.* Craven	43
——— *v.* Cuff	133
——— *v.* De Wruitz	432
——— *v.* Everett	70
——— *v.* Ferrand	250, 381
——— *v.* Forty	350
——— *v.* Hill	345
——— *v.* Hodson	367, 368
——— *v.* Johnson	60, 152
——— *v.* Jones	243
——— *v.* Kendall	82, 435
——— *v.* Knox	129, 243
——— *v.* Lord	77
——— *v.* M'Clure	82, 372
——— *v.* Marsack	156, 199
——— *v.* Martin	120, 121, 122, 433
——— *v.* Mercer	25, 159, 220, 332, 333, 383, 387
——— *v.* Mingay	166
——— *v.* Monday	375
——— *v.* Moneypenny	433
——— *v.* Mullett	281, 286, 287
——— *v.* Nightingale	92
——— *v.* Page	233
——— *v.* Pickery	155
——— *v.* Saltzman	142
——— *v.* Sheppard	219
——— *v.* Smith	29
——— *v.* Thatcher	289
——— *v.* Thorne	347
——— *v.* Vertue	193
——— *v.* Whiting	57
——— *v.* Winter	52, 248, 251, 252
——— *v.* Woodcock	411
Smout *v.* Ilbury	38
Snaith *v.* Mingay	86, 398
Snee *v.* Prescot	157
Snellgrove *v.* Baily	176
Snow *v.* Peacock	163, 219, 371
——— *v.* Sadler	372
Soares *v.* Glyn	152, 153
Solarte, Ex parte	449
——— *v.* Palmer	272, 273, 274, 275, 279
Sollers, Ex parte	462
Solly *v.* Forbes	238, 246
——— *v.* Hinde	129
Solomon *v.* Turner	132

PAGE
Solomons v. Bank of England 39, 164
——— v. Stavely 260
Southall v. Rigg .. 145, 425
South Carolina Bank v. Case 43
South Sea Co. v. Wymondsell 342
Soutten v. Soutten 447
Soward v. Palmer 223, 246, 292
Sowerby v. Butcher 36, 125, 126
Sparrow v. Carruthers .. 64
——— v. Chisman 46
Spears v. Hartley 339
Spencer v. Demett 448
Spicer v. Burgess 320
Spiller v. Johnson 419
——— v. Westlake .. 131, 193
Spindler v. Grellett 214
Spong v. Wright .. 347, 348
Spooner v. Gardiner .. 120, 295
Spratt v. Hobhouse 10
Sproat v. Mathews .. 193, 257
Sproule v. Legg 87, 396, 419
Spyer v. Thelwell 418
Stables v. Ely 53
——— v. O'Kines 293
Stackwood v. Dunn 363
Stafford (Mayor of) v. Till .. 68
Stagg v. Elliott 33
Standage v. Creighton .. 299
Starey v. Barns 367
Starhouse v. Barnston 339
Starke v. Cheesman 87, 90, 216, 422
State Fire Insurance Co., In re 72
Steadman v. Duhamel 390, 398, 399
——— v. Gooch .. 233, 235
Stebbing v. Spicer 80
Stedman v. Gooch 379
——— v. Martinnant .. 446
Steel v. Bradfield 412
Steele v. Harmer 42, 71, 178, 198, 199, 234, 425
——— v. Benham 198
Steers v. Lashley 141
Stein v. Yglesias 167, 168, 189
Stephens, Ex parte .. 369, 464
——— v. Reynolds .. 43, 44
——— v. Underwood .. 428
——— v. Wilkinson .. 131
Stericker v. Barker 422
Sterndale v. Hankinson .. 344
Stevens v. Jackson 59
——— v. Lloyd 318
——— v. Lynch .. 252, 298
——— v. Thacker 198
Stevenson v. Newnham .. 442
PAGE
Stevenson v. Oliver 419
——— v. Roche 248
Steward v. Dunn 72
Stewart v. Kennett 284
——— v. Kirkwall 64
——— v. Lee 22, 219
Stock v. Mawson 134
Stockbridge v. Sussams .. 365
Stocken v. Collin 274, 276, 277, 281
Stockman v. Parr 275
Stoessiger v. South Eastern Rail. Co. 86
Stone, Ex parte 365
——— v. Compton 244
——— v. Marsh 219
——— v. Metcalfe 98
Stones v. Butt 402
Storm v. Stirling 5, 12, 74, 79, 93, 95
Story v. Atkins 6
Stoughton v. Kilmorey, Earl of, 425
Stoveld v. Eade 226
Strachan v. Barton 466
Straker v. Graham .. 182, 385
Strange v. Ellison 162
——— v. Lee 226
——— v. Price 272
——— v. Wigney 371
Stratton v. Hill 417
——— v. Matthews 404, 407
Streatfield v. Halliday .. 8
Strickland v. Mansfield .. 15
Strithorst v. Græme 345
Strong v. Foster .. 8, 243, 244
——— v. Hart .. 250, 381
Stuart v. Bute 175
Sturdy v. Henderson 78, 207, 341
Sturleyn v. Albany 55
Sturtevent v. Ford .. 167, 168
Suse v. Pompe 152, 413
Sutton, Ex parte 36
——— v. Toomer 78, 322, 341, 435
Swain v. Lewis 301
Swaine v. Wallinger 338
——— v. Ware 254
Swan, Ex parte 167, 168, 188, 265, 267, 332
——— v. North British Australian Company 188
——— v. Steele .. 43, 44, 48, 49
Swann v. Cox 194
Swansea v. Vanderkeyden .. 60
Swayn v. Stephens 345
Swears v. Wells 114
Sweeting v. Fowler 80
——— v. Halse .. 115, 198
Swift v. Tyson 39, 126

PAGE

Swinyard *v.* Bowes 289, 291, 381
Sykes *v.* Gyles 40, 381
Symonds *v.* Atkinson 405
Symons *v.* May 469

T.

Taft's Case 327
Tallis *v.* Tallis 136
Tamvaco *v.* Simpson 383
Tanner *v.* Smart 346, 347, 351, 357
Tapley *v.* Martens 24
Tarleton *v.* Allhusen .. 234, 379
——— *v.* Shingler 320
Tassell *v.* Lewis .. 206, 283
Tate *v.* Hilbert 24, 175, 176
Tatlock *v.* Harris 81
Tattersall *v.* Fearnley 117
—— —— *v.* Parkinson .. 427
Tayler, Ex parte 456
Taylor *v.* Booth .. 83, 419
——— *v.* Briggs 380
——— *v.* Burgess 244
——— *v.* Croker 60, 199, 200
——— *v.* Crowland Gas Co. .. 136
——— *v.* Dobbins 86
——— *v.* Forbes 305
——— *v.* Hipkins 343
——— *v.* Jones 298
——— *v.* Kinloch .. 76, 459
——— *v.* Moseley .. 318, 323
——— *v.* Plumer 382
——— *v.* Stott 303
——— *v.* Wilson 142
Teague's Case 326
Teague *v.* Hubbard ..7, 42, 71, 89
Terrell *v.* Higgs 415
Terry *v.* Parker .. 216, 420
Thackray *v.* Blackett 294, 372
Thibault *v.* Gibson .. 315, 316
Thicknesse *v.* Bromilow .. 44
Thiedemann *v.* Goldschmidt 128, 135
Thimbleby *v.* Barron 236, 239, 247
Thomas, Ex parte .. 457, 458
——— *v.* Bishop 87
——— *v.* Courtnay 134
——— *v.* Dunn .. 335, 410
——— *r.* Fenton 295
——— *v.* Newton .. 119, 415
——— *v.* Taylor 415
Thomason *v.* Frere .. 53, 464
Thompson *v.* Brown 226
——— *v.* Clubly .. 152, 244
——— *v.* Dominy 8
——— *v.* Giles 463
——— *v.* Hodgson 177

PAGE

Thompson *v.* Perceval 48, 199, 233, 381
——— *v.* Waithman .. 354
——— —— *v.* Wesleyan Newspaper Association 71
Thorne *v.* Smith .. 380, 427
Thornton, Ex parte 456
—— —— *v.* Dick 195
——— *v.* Illingworth .. 59
Thorpe *v.* Booth 341
Threlfall *v.* Lunt 179
—— —— *v.* Webster 410
Thrupp *v.* Fielder 59
Tickell *v.* Short 348
Tigar *v.* Gordon 418
Tiley *v.* Courtier 10
Timmins *v.* Gibbins .. 161, 162
Timmis *v.* Platt 424
Tims *v.* Williams 74
Tindal *v.* Bell 404
——— *v.* Brown 207, 252, 284, 285
Tinney *v.* Cecil 469
Tinson *v.* Francis 167
Tippets *v.* Heane 349
Titus *v.* Lady Preston .. 204
Toley *v.* Carlon 179
Tomkins *v.* Ashby .. 12, 28, 435
Toms *v.* Powell .. 224, 404
Took *v.* Hollingworth .. 462
—— *v.* Tuck 133
Tootel, Ex parte 445
Toppy *v.* Keysell 442
Toulmin *v.* Price 376
Towgood, Ex parte 457
Towler *v.* Chatterton 355
Townrow *v.* Benson 369
Towns *v.* Mead 345
Townsend *v.* Deacon 345
Treacher *v.* Hinton 289
Trecothick *v.* Edwin .. 87, 214
Trent Navigation *v.* Harley .. 245
Treuttell *v.* Barandon 84, 157, 158, 405
Tricky *v.* Larne 131
Trier *v.* Bridgman 6
Triggs *v.* Newnham 211
Trimby *v.* Vignier 174, 255, 394
Trimmer *v.* Oddie .. 191, 195
Trinder *v.* Smedley 425
Trueman *v.* Fenton 127
—— —— *v.* Hurst 60
Tucker *v.* Robarts 200
——— *v.* Wilson .. 174, 175
Tuft's Case 81
Tullock *v.* Dunn .. 349, 352
Turner *v.* Denman 423

PAGE

Turner v. Fitt 419
——— v. Hoole 133
——— v. Leach .. 288, 300
——— v. Leech 297
——— v. Mead 208
——— v. Stones 161, 203, 290
——— v. Taylor 412
Turney v. Dodwell 350
Twopenny v. Young .. 198, 250
Tye v. Gwynne 131
Tyers v. Stunt 469

U.

Udal v. Walton 443
Udell v. Atherston 124
Upstone v. Marchant 116
Usburne, Ex parte 51
Usher v. Dauncy 166
Uther v. Rich 121, 157, 163, 427

V.

Vallance v. Siddel 126, 314, 315
Valpy v. Oakley 383
Vanderdonckt v. Thelluson .. 214
Vandewall v. Tyrrell 256, 261, 264, 266, 268
Vandyk v. Hewitt 136
Vansandau v. Corsbie .. 447
Van Wart v. Wooley 40, 161, 289 290, 291
Vaughan v. Fuller .. 217, 298
——— v. Harris 411
——— v. Matthews .. 430
Veal v. Veal 176, 177
Vere v. Ashby .. 32, 49
—— v. Lewis 81
Vernon v. Boverie .. 24, 224
Vincent v. Horlock 151
Vise v. Fleming 51
Vulliamy v. Noble .. 52, 53

W.

Wackerbath, Ex parte 257, 264, 265, 267
Wade v. Beasley 410
Wagstaff, Ex parte 367
Wain v. Bailey 228, 373, 374
Wainman v. Kynman .. 347
Wake v. Harrop 37
—— v. Tinkler 361

PAGE

Wakefield Bank, Ex parte .. 462
Walker, Ex parte 451, 452, 453 454
——— v. Atwood 194
——— v. Barnes 223, 246, 304 410
——— v. Butler 349
——— v. Clements 342
——— v. Collick 344
——— v. M'Donald 150
——— v. Neville 239
——— v. Pilbeam 446
——— v. Seaborne 232
Wallace v. Hardacre 137, 461, 464
——— v. Kelsall 46, 224, 362
Waller v. Lacy 227, 347, 349
Wallis v. Littell 100
——— v. Swinburne 447
Walmesley v. Child 376
——— v. Cooper 238
Walpole v. Pulteney 198
Walter v. Cubley .. 212, 318
——— v. Haynes 276
Walters v. Brogden 15
Walton v. Hastings .. 319, 320
——— v. Mascall 127, 203, 291
Walwyn v. St. Quintin 220, 248, 293, 295
Wankford v. Wankford 55, 56
Ward v. Byrne 136
—— v. Clarke 442
—— v. Evans 10, 24, 160, 161, 208, 383
—— v. Johnson 234
—— v. Turner .. 175, 176
Ward (Lord) v. Oxford Railway Co. 15
Ware v. Lord Egmont .. 123
Waring, Ex parte .. 462, 463
Warmsley v. Macey 407
Warrington, Ex parte 314, 315
——— v. Early 319
——— v. Furbor 202, 203, 291
Warwick v. Bruce 61
——— v. Nairn 131
——— v. Noakes 377
——— v. Rogers 196
Washbourne v. Burrows .. 316
Waters v. Thanes 338
——— v. Tompkins 355
Watkins v. Maule .. 54, 155
——— v. Morgan 302
——— v. Wake 417
Watson v. Alcock .. 246, 248
——— v. Evans 80
——— v. Kightly .. 85, 417

	PAGE
Watson *v.* Medex	447
——— *v.* Mid Wales Railway Co...	67
——— *v.* Poulson	114
——— *v.* Russell	164
Watters *v.* Smith	232
Watts *v.* Jefferies	26
—— *v.* Shuttleworth ..	245
Waugh *v.* Carver	45
Way *v.* Hearne	77
Waynam *v.* Bend 11,	154, 435
Webb's Case	328
Webb *v.* Firmaner	204
——— *v.* Hewitt	251
——— *v.* Inwards	410
——— *v.* Spicer 98,	100, 236
——— *v.* Weatherby ..	427
Webster, Ex parte	445
——— *v.* Kirke ..	340, 342
—— —— *v.* Spencer	56
Wedlake *v.* Hurley	185
Weeks *v.* Argent	424
Wegersloffe *v.* Keene	394, 422
Welby *v.* Drake ..	227, 232
Welch *v.* Seaborn	435
Wells *v.* Girling ..	133, 311
—— *v.* Hopkins	129
—— *v.* Masterman ..	43, 47
—— *v.* Porter	140, 142
Wennall *v.* Adney	127
Westcott *v.* Hodges	446
Westmacott *v.* Cook	406
Weston *v.* Tomlinson ..	303
Whaley *v.* Pajot	139
Whateley *v.* Crowter ..	415
Whatley *v.* Tricker	198
Wheatley *v.* Williams 11,	435
Wheeler *v.* Wheeler	57
Wheelwright *v.* Jutting ..	407
Whiley's Case	328
Whistler *v.* Forster ..	17, 116
——— —— *v.* Fowler	155
Whitaker *v.* The Bank of England	185, 211, 222
Whitcomb *v.* Whiting.. ..	352
White, Ex parte	321
——— *v.* Ledwich	84
——— *v.* North	11
——— *v.* Wright	314
Whitehead *v.* Walker 167,	168, 270, 342
Whitelock *v.* Musgrove ..	433
Whitfield *v.* Hodges	248
——— *v.* Lord Le Despencer	370
Whitlock *v.* Underwood 78,	210
Whitmore *v.* Francis	154
Whittaker *v.* Edmunds ..	120
Whitwell *v.* Bennett	16
Wiffen *v.* Roberts 128,	129, 206
Wigan *v.* Fowler	69
Wiggins *v.* Read	139
Wilders *v.* Stevens ..	126, 155
Wildman, Ex parte ..	403, 456
Wilkes *v.* Hopkins	435
Wilkin *v.* Reed	439
Wilkins *v.* Casey	465
——— *v.* Jadis ..	211, 300
Wilks *v.* Adcock	407
—— *v.* Back	44
—— *v.* Jacks	293
Wilkinson *v.* Byers	232
——— *v.* Godefrey	26
——— *v.* Johnson 154,	196, 334
——— *v.* L'Eangier 29,	415
——— *v.* Lutwidge ..	199
Williams, Ex parte	303
——— *v.* Bartholomew ..	298
——— *v.* Bayley	61
——— *v.* Bulmore	144
——— *v.* Burrell	53
——— *v.* Clarke	155
——— *v.* Evans .. 40,	381
——— *v.* Everett	185
——— *v.* Germaine 207,	262, 264
——— *v.* Griffith 227,	347, 348
—— —— *v.* Harrison	58
——— —— *v.* James	221
——— —— *v.* Jarrett	116
——— *v.* Jones	338
——— —— *v.* Keats ..	51, 53
——— *v.* Moore ..	58, 59
——— —— *v.* Seagrove.. ..	153
——— —— *v.* Smith ..	210, 280, 281
——— —— *v.* Thomas	53
——— —— *v.* Trye	140
——— —— *v.* Waring ..	87, 214
Williamson *v.* Bennett 28,	93
——— —— *v.* Johnson ..	44
——— —— *v.* Watts ..	58, 60
Willins *v.* Smith	352
Willis *v.* Bank of England ..	164
Willis *v.* Barrett	80
—— *v.* De Castro	238
—— *v.* Newham	355
Willison *v.* Patteson ..	67, 137
——— *v.* Whitaker	247
Wills *v.* Noot	116
Wilmot *v.* Williams	213
Wilson, Ex parte ..	249, 444
——— *v.* Barthrop	38
——— *v.* Gabriel	360

	PAGE
Wilson *v.* Justice	319
——— *v.* Ray	133
——— *v.* Reddall	420
——— *v.* Stubs	80
——— *v.* Swabey ..	284, 286
——— *v.* Tumman ..	32, 49
——— *v.* Vysar ..	113, 114
Wilton, In re	380
Winch *v.* Fenn..	310
Winchester, Bishop of, *v.* Fournier	179
Windham *v.* Wither ..	303, 411
Windle *v.* Andrews	84, 259, 260
Winterbottom's Case	57
Wintle *v.* Crowther	48
Wise *v.* Charlton ..	12, 98, 111
—— *v.* Prowse..	403
Withall *v.* Masterman.. ..	252
Witham *v.* Gompertz	406
Witt *v.* Amiss	176
Wittersheim *v.* Lady Carlisle..	340
Wodehouse *v.* Farebrother	243, 415
Wood *v.* Braddick ..	351, 252
—— *v.* Brown	298
—— *v.* Copper Miners' Co. ..	415
—— *v.* De Mattos	444
—— *v.* Dodgson	446
—— *v.* Grimwood	309
—— *v.* Jowett	469
—— *v.* Mytton	6
—— *v.* Peyton	430
—— *v.* Smith	368
Woodbridge *v.* Spooner	4, 90
Woodcock *v.* Houldsworth ..	276
Woodford *v.* Whiteley	373, 374, 382
Woodland *v.* Fear	25, 161, 162, 283
Woodroffe *v.* Hayne ..	126, 226
Woods *v.* Dean	299
Woodthorpe *v.* Lawes	273, 275, 285
Woodward *v.* Lord Dacy ..	56
——— *v.* Pell	171
Wookey *v.* Poole ..	157, 164
Woolley *v.* Clark	54
Woolner *v.* Devereux.. ..	335
Woolsey *v.* Crawford	413
Woolway *v.* Rowe	432
Worley *v.* Harrison	93
Worrall, Ex parte	456
Worthington *v.* Grimsditch	349, 350
Wright *v.* Laing	226
——— *v.* Lainson ..	76, 459
——— *v.* Leonard ..	60, 63
——— *v.* Reed	10
——— *v.* Riley	115
——— *v.* Shawcross	281
——— *v.* Watts	428
Wyat *v.* Bulmer	143
Wyatt *v.* Marquis of Hertford	24
Wych *v.* East India Co. ..	344
Wyke *v.* Rogers	251
Wylde, Ex parte ..	266, 267
Wylie's Case	331
Wyllie *v.* Pollen	124
Wynne *v.* Callander ..	144, 304
——— *v.* Jackson ..	394, 397
——— *v.* Raikes	189, 190, 191

X.

Ximenes *v.* Jacques	139

Y.

Yallop *v.* Ebers	243
Yarborough *v.* Bank of England	150
Yates, Ex parte	150, 319, 320
—— *v.* Bell	185, 186
—— *v.* Dalton..	45
—— *v.* Grove	95
—— *v.* Hoppe	130
—— *v.* Nash	74, 79, 95
—— *v.* Sherrington	66
Yea *v.* Fouraker	351
Yeomans *v.* Bradshaw ..	54
Yonge, Ex parte	446
Young *v.* Adams ..	159, 162
——— *v.* Bank of Bengal	366, 367
——— *v.* Cole	162
——— *v.* Grote ..	25, 332
——— *v.* Geiger	364

Z.

Zinck *v.* Waller	462
Zouch *v.* Clay	317
——— *v.* Parsons	58

BILLS OF EXCHANGE.

CHAPTER I.

GENERAL OBSERVATIONS ON A BILL OF EXCHANGE.

Explanation of Terms.	1	*May be taken in execution*	3
Peculiar Qualities of Contracts on Bills or Notes	2	*Where a Bill or Note may operate as a Will or Testamentary Instrument*	4
Effect of drawing or indorsing a Bill	3	*As a declaration of Trust*	4
How far Bills and Notes are considered as Chattels	3		

Explanation of terms.

A BILL of Exchange is an unconditional written order (*a*) from A. to B., directing B. to pay C. a sum certain of money therein named.

A. is called the drawer, B. the drawee, and C. the payee.

Sometimes A. the drawer is himself the payee.

And usually the bill is made payable, not to the payee alone, but also to his order or to the bearer.

When B., the drawee, has undertaken to pay the bill, he is called the acceptor.

If the bill is made payable to C., *or bearer*, C. may transfer the bill to D. by merely delivering it into his hands, and then D. stands in the same situation with regard to B. the acceptor, as C. the original payee did.

If the bill be payable to C., *or order*, then C. cannot transfer, except by a written order, usually on the back of the bill, called an indorsement, after which C. is called the

(*a*) It is said, that it was formerly essential to the validity of a bill of exchange, that it should be drawn in one place and payable in another: no such requisite now exists by the English law, although it is in general otherwise, according to the definitions in the codes prevailing on the continent of Europe; see the note of Mr. Serjeant Manning to *Miller* v. *Thompson*, 4 M. & G. 260.

CHAPTER I.

indorser, and D., to whom it may be so transferred, the indorsee (*b*).

Holder is a general word, applied to any one in actual or constructive possession of the bill (*c*), and entitled, at law, to recover or receive its contents (*d*) from the parties to it. No one but the holder can maintain an action on a bill of exchange.

Two peculiar qualities of contracts on bills or notes.

By the common law of England no contract or debt is assignable, our ancestors appearing, in the times of simplicity, to have apprehended from such transfer much oppression and litigation. But mercantile experience has proved the assignment of debts to be indispensable, and bills of exchange to be the most convenient instruments for facilitating, securing, and authenticating the transfer. They have, therefore, come into universal use among all civilized nations, and the common law has recognized them as part of the *law merchant* (*e*).

The common law again distinguishes contracts into two kinds: contracts under seal or by deed; and contracts not under seal or simple contracts. Contracts under seal are valid without consideration; simple contracts are void unless consideration be averred in pleading and established in evidence.

All the contracts arising on a bill of exchange are simple contracts, but they differ from other simple contracts in these two particulars: first, that the benefit of the contract

(*b*) See Chap. XI. on TRANSFER.

(*c*) A man who has no interest in the bill, nor possession of it, but only lends his name for the purpose of suing on it, is not the holder. *Emmett* v. *Tottenham*, 8 Exch. 884; *Gill* v. *Lord Chesterfield*, Ibid.; *Sainsbury* v. *Parkinson*, Ibid. But if before action it be indorsed and delivered to an agent without his principal's knowledge, and the principal after action brought ratifies the delivery, that ratification will relate back and make the agent holder from the time of delivery. *Ancona* v. *Marks*, 31 L. J. 163, Exch.; 7 H. & N. 686, S. C.

(*d*) This latter branch of the definition is equally essential. For if a man find or steal a bill, though his mere possession will give him a title to retain the instrument as against strangers, yet he cannot sue on the bill, for under a traverse of the indorsement or delivery to himself, which he must allege in his declaration, the circumstances attending his acquisition of the bill may be shown. *Marston* v. *Allen*, 8 M. & W. 494.

(*e*) Usages which are part of the law merchant need not be pleaded. Such are the assignable qualities of bills of exchange and bills of lading. Such also the general lien of bankers on the securities of their customers. "When," says Lord Campbell, "a general usage has been judicially ascertained and recognized, it becomes part of the law merchant, which Courts of justice are bound to know and recognize." *Brandao* v. *Barnett*, 3 C. B. 530, Dom. Proc.; *Barnett* v. *Brandao*, 6 M. & G. 665.

is assignable at law, and its obligation communicable (*f*); secondly, that consideration will be presumed till the contrary appear.

Effect of drawing or endorsing bill.

The legal effect of drawing a bill, payable to a third person, is a conditional contract by the drawer to pay the payee, his order, or the bearer, as the case may be, if the acceptor do not. The effect of accepting a bill, or making a note, is an absolute contract, on the part of the acceptor of the one, or maker of the other, to pay the payee, or order, or bearer, as the instrument may require. The effect of indorsing is a conditional contract, on the part of the indorser, to pay the immediate or any succeeding indorsee or bearer, in case of the acceptor's or maker's default.

How far bills and notes are considered as chattels.

Bonds, bills, notes and other securities are not the subjects of larceny at common law. For the words *bona et catalla*, used in indictments, "don't of their proper nature," says Lord Coke, "extend to charters and evidences concerning freehold, or inheritance, or obligations, or other deeds or specialties, being things in action" (*g*). And these observations as to obligations and deeds are at common law applicable also to bills of exchange and promissory notes (*h*).

In an indictment, bills or notes ought not in strict propriety to be described as chattels (*i*).

But, for almost all purposes, they are comprehended under the general words *goods and chattels*, or either of them. Thus, as chattels, they are forfeitable to the Crown, and may be the subject of reputed ownership or fraudulent transfer (*j*).

May be taken in execution.

At common law, neither money nor securities for money could be taken in execution, at the suit of a subject. But now, by the 1 & 2 Vict. c. 110, s. 12, money, bank notes,

(*f*) In one sense a bill of lading is at common law assignable, that is to say, its indorsement assigns the property, but does not transfer the contract. *Thompson* v. *Dominy*, 14 M. & W. 403. Now, however, by a recent statute, rights of action pass to the indorsee of a bill of lading. (18 & 19 Vict. c. 111.)

(*g*) *Calye's case*, 8 Co. Rep. 33; 4 Bla. Com. 234; 2 East, P. C. 597. But see now 24 & 25 Vict. c. 96, ss. 1 & 27, by which, for the purposes of that act relating to larceny, they are comprehended within the words "*valuable security*" and the word "*property*."

(*h*) 4 Bla. Com. 234; 2 East, P. C.

(*i*) *Sadi and Morris's case*, 2 East, P. C. 16, s. 37.

(*j*) *Slade's case*, 4 Co. Rep. 93; *Bullock* v. *Dodds*, 2 B. & Ald. 258; *Ryal* v. *Rolle*, 1 Atk. 165; 1 Ves. sen. 363; *Hornblower* v. *Proud*, 2 B. & Ald. 327; *Cumming* v. *Bailey*, 6 Bing. 363; 4 Moo. & P. 36, S. C.; *Edwards* v. *Cooper*, 11 Q. B. 33. See Chap. XXXVI. on BANKRUPTCY.

CHAPTER I.

checks, bills, promissory notes, and other securities for money, may be taken in execution. The money and bank notes are to be handed over by the sheriff to the execution creditor, and the sheriff, on receiving a sufficient indemnity, is to sue in his own name (*k*).

Bills and notes may be taken under an extent.

Where a bill or note may operate as a will or testamentary instrument.

A bill, check or note, or an indorsement thereon, made before the late act, 1 Vict. c. 26, may be a testamentary instrument. A testator gave three checks, at different times, to a lady, and on the corresponding parts of the check-book were found entries by him to the effect that they were given by him to make provision for her in case of his death. The checks were held to be testamentary instruments, giving cumulative legacies (*l*). But parol evidence is inadmissible to show that an instrument was only to be payable in case of the testator's death (*m*). An indorsement on a note, as "I give this note to C. D.," ~~may be~~ might have been testamentary (*n*).

As a declaration of trust.

A bill or promissory note may in some cases be a declaration of trust (*o*).

(*k*) See Chap. XI. on TRANSFER.

(*l*) *Bartholomew* v. *Henley*, 3 Phill. 317.

(*m*) *Woodbridge* v. *Spooner*, 3 B. & Ald. 233; 1 Chit. R. 661, S. C.

(*n*) *Chaworth* v. *Beech*, 4 Ves. 565. For the circumstances under which bills and notes will pass under a will, or as a *donatio mortis causâ*, see Chap. XI. on TRANSFER.

(*o*) *Murray* v. *Glasse*, 23 L. J., Ch. 126.

CHAPTER II.

OF A PROMISSORY NOTE.

What it is 5
How considered at Common Law and what by Statute 5
Promissory Notes made out of England . . . 6
Form of a Note 6
Note by a man to himself . 6
Note by a man to himself and another 7
Notes payable by instalments 7
Joint and several Notes . 7
Where there is principal and surety 8
Contribution between joint makers 8
Bank Notes 9
Bank of England Notes . 9
When Bank of England Notes are a legal tender . 10
Country Bank Notes . . . 10
When Country Bank Notes are a legal tender . . 10
When Money had and received will lie for them . 10
Of the contracting words in a Promissory Note . . 10
Other matters contained in a Note 12

What it is.

A PROMISSORY note (*a*), or, as it is frequently called, a note of hand, is an absolute (*b*) promise in writing, signed but not sealed, to pay a specified sum at a time therein limited, or on demand, or at sight, to a person therein named or designated (*c*), or to his order, or to the bearer (*d*).

The person who signs the note is called the maker. The instrument is not complete, and available until delivery by the maker (*e*).

How considered at common law, and what by statute.

At common law, no note of hand was transferable; and before the stat. of 3 & 4 Anne, c. 9, it was the opinion of Lord Holt and the majority of the Judges, that no action could be maintained, even by the payee, on a promissory note as an instrument, but that it was only evidence of a

(*a*) As to notes in an irregular form, see post, Chap. VII.

(*b*) As to conditional instruments, see post, Chap. VII.

(*c*) See *Storm* v. *Stirling*, 3 E. & B. 842; *Cowie* v. *Stirling*, 6 E. & B. 333, and Chapters VI. and VII.

(*d*) 2 Bla. Com. 467.

(*e*) *Chapman* v. *Cotterell*, 34 L. J. 186, Exch.

CHAPTER II.

debt (*e*). That statute, however, makes promissory notes assignable and indorsable, like bills of exchange, and enables the holder to bring his action on the note itself.

Promissory notes made out of England.

Under the statute of Anne, foreign notes may be declared upon and indorsed. "They are," observes the Court of K. B., "within the words and the spirit of the Act; the "words are 'all notes.' The act was made for the advance- "ment of trade, and ought, therefore, to receive a liberal "construction. It is for the advantage of commerce that "foreign, as well as inland bills, should be negotiable" (*f*). It has been suggested to be a doubtful point, whether this statute makes English notes assignable abroad (*g*), but it is now decided that it does (*h*).

Form of a note.

No precise form of words is essential to the validity either of a bill of exchange, or of a promissory note (*i*).

Note by a man to himself.

A note cannot be made by a man to himself without more. But if made to himself, *or order*, and indorsed in blank, it becomes a note payable to bearer (*k*); and if specially indorsed it becomes a note payable to the indorsee or order (*l*).

A note by which the defendant and four other persons promised to pay 750*l*. "to our and each of our order," and indorsed by defendant alone, was held good (*m*).

A note payable to the maker's order, and afterwards indorsed, should be declared on and stamped according to its legal effect (*n*).

(*e*) *Buller* v. *Cripps*, 6 Mod. 29; *Clerke* v. *Martin*, 2 Ld. Raym. 757; *Story* v. *Atkins*, 2 Ld. Raym. 1427; 2 Stra. 719, S.C.; *Brown* v. *Harraden*, 4 T. R. 148; *Trier* v. *Bridgman*, 2 East, 359.

(*f*) *Milne* v. *Graham*, 1 B. & C. 192; 2 D. & R. 294, S. C.; *Houriet* v. *Morris*, 3 Camp. 303; *Bentley* v. *Northouse*, 1 M. & M. 66. But it was at one time thought that the act did not extend to notes made abroad. *Carr* v. *Shaw*, H. T. 39 Geo. 3; Bay. 23.

(*g*) *De la Chaumette* v. *The Bank of England*, 9 B. & C. 208.

(*h*) S. C., 2 B. & Ad. 385. As to the transfer abroad of notes made abroad, and English notes, see the Chapter on FOREIGN BILLS and FOREIGN LAW.

(*i*) *Chadwick* v. *Allan*, Stra. 706; *Peto* v. *Reynolds*, 9 Exch. 410; *Reynolds* v. *Peto*, 11 Exch. 418.

(*k*) *Browne* v. *De Winton*, 17 L. J., C. P. 281; 6 C. B. 336, S. C.

(*l*) *Gay* v. *Lander*, 17 L. J., C. P. 286; 6 C. B. 336. See also *Wood* v. *Mytton*, 10 Q. B. 805, and *Flight* v. *Maclean*, 16 M. & W. 51. So in America it has been held that an instrument payable to the maker and indorsed by him is a promissory note. *Maldow* v. *Caldwell*, 7 Missouri, 563. And see 55 Geo. 3, c. 184, Sched. pt. I.

(*m*) *Absolon* v. *Marks*, 11 Q. B. 19.

(*n*) *Hooper* v. *Williams*, 2 Exch. 13; *Flight* v. *Maclean*, 16 M. & W. 51.

Nor can there be a note by the maker to himself and another man (*o*). Nor a joint note by the maker and others to himself. But such a note, if joint and several, may be valid at the suit of the payee, as to the several contracts of his co-makers (*p*).

Note by a man to himself and another.

A note may be made payable by instalments, and yet be within the statute of 3 & 4 Anne, c. 9 (*q*). Days of grace are allowed on each instalment (*r*).

Of notes payable by instalments.

It is conceived that presentment and notice of dishonour is required when each instalment falls due; but that laches as to one instalment in ordinary cases only discharges an indorser as to that one. And that a note payable by instalments cannot be indorsed over for less than the entire sum due upon it.

A note payable by instalments is within the statute, although it contain a provision that, on failure of payment of one instalment, the whole debt is to become payable (*s*).

Joint and several notes.

A note by two or more makers may be either joint only, or joint and several. A note signed by more than one person and beginning, "We promise," &c., is a joint note only. A joint and several note usually expresses that the makers jointly and severally promise. But a note signed by more than one person, and beginning, "I promise," &c., is several as well as joint (*t*). So, a note beginning in the singular, "I promise," and signed by one partner for his co-partners, is the joint note of all (*u*), and has been held to be also the several note of the signing partner (*v*).

A joint and several note, though on one piece of paper,

(*o*) See *Moffatt* v. *Van Millingen*, 2 B. & P. 124, n.; *Mainwaring* v. *Newman*, Ibid. 120. See *Teague* v. *Hubbard*, 8 B. & C. 345. But indorsement may remove the difficulty. *Quære* as to the effect of survivorship.

(*p*) *Beecham* v. *Smith*, 27 L. J., Q. B. 257; E. B. & E. 442, S. C.

(*q*) *Orridge* v. *Sherborn*, 11 M. & W. 374; 12 L. J., Exch. 313, S. C.

(*r*) Ibid.

(*s*) *Carlon* v. *Kenealy*, 12 M. & W. 139.

(*t*) *March* v. *Ward*, Peake's Rep. 130; *Clerk* v. *Blackstock*, Holt, N. P. C. 474. So it has been held in America. *Hemmenway* v. *Stone*, 7 Mass. 58; *Barnett* v. *Skinner*, 2 Bailey, 88. So a bond in the singular number, executed by several, is several as well as joint. *Sayer* v. *Chaytor*, 1 Lutw. 695; *Galway* v. *Mathew*, 1 Camp. 403; 10 East, 264, S. C. As to a joint or joint and several warrant of attorney, see *Dalrymple* v. *Fraser*, 15 L. J., C. P. 193; 2 C. B. 698, S. C.

(*u*) *Doty* v. *Smith*, 11 Johnson's American Rep. 543.

(*v*) *Hall* v. *Smith*, 1 B. & C. 407; 2 D. & R. 584; *Lord Galway* v. *Mathew*, 1 Camp. 403. But *Hall* v. *Smith* seems to be overruled in *Ex parte Buckley*, 14 M. & W. 475; 15 L. J., Bkcy. 3, S. C. See also *Maclae* v. *Sutherland*, 3 E. & B. 1.

CHAPTER II.

comprises, in reality and in legal effect, several notes (*w*). Thus, if A., B. and C. join in making a joint and several promissory note, there are, in effect, four notes. There is the joint note, of the three makers, and there are also the several notes of each of the three (*x*). The joint note may be valid although the several notes are void (*y*). Yet, for some purposes, it is still one contract. Thus, an alteration which affects the liability of one maker vitiates the entire instrument (*z*).

Where there is principal and surety.

Where a note is on its face joint, or joint and several, it is conceived that evidence to show that one maker is surety for the other (*a*) is inadmissible at law, if the question arise between the creditor and the surety; but evidence to that effect has been received (*b*). Where, however, the question arises between the principal debtor and the sureties in an action for indemnity or contribution, such evidence is admissible.

Contribution between joint makers.

Joint debtors equally liable, as between themselves (not being general partners (*c*)), are severally entitled at law to contribution (*d*), even against the executor of a contribu-

(*w*) *Fletcher* v. *Dyte*, 2 T. R. 6, Ashurst, J.; *Owen* v. *Wilkinson*, 28 L. J., C. P. 3; 5 C. B., N. S. 526, S. C.

(*x*) See the observations of Parke, B., in *King* v. *Hoare*, 13 M. & W. 505; *Bulbeck* v. *Jones*, 5 Jur., N. S. 1317; *Beecham* v. *Smith*, E. B. & E. 442. In such a case the payee may sue the three, or each singly, he cannot do both. *Streatfield* v. *Halliday*, 2 T. R. 782.

(*y*) *Maclae* v. *Sutherland*, 3 E. & B. 1.

(*z*) *Gardner* v. *Walsh*, 5 E. & B. 91.

(*a*) *Price* v. *Edmunds*, 10 B. & C. 578; *Strong* v. *Foster*, 17 C. B. 201; but see *Manley* v. *Boycott*, 2 E. & B. 46.

(*b*) *Garrett* v. *Jull*, S. N. P. 377; and see the observations of Williams, J., in *Reynolds* v. *Wheeler*, 30 L. J., C. P. 351; 10 C. B, N. S. 561, S. C.; *Hall* v. *Wilcox*, 1 M. & Rob. 58. The admission of such evidence seems to contravene the general rule of law, that parol evidence is inadmissible to vary or explain a written contract. Where the indorsee sues, another objection interposes, that the indorsee would be affected by a contract of which he had no notice. Besides, from the case of *Fentum* v. *Pococke*, 5 Taunt. 192; 1 Marsh. 14, S. C., which has been recognized as law ever since it was decided, this general principle seems to result, that parties to a negotiable security shall be held to the consequences of the characters which they severally assume on the face of the instrument. Indeed, in *Strong* v. *Foster*, 17 C. B. 201, the Court of C. P., relying on some expressions of Lord Cottenham in *Holtier* v. *Eyre*, 9 Cl. & F. 45, seemed to think the rule the same in equity as at law. But the case of *Strong* v. *Foster* may be considered as overruled, see post, Chap. XVIII. And see *Perfect* v. *Musgrave*, 6 Price, 111, and Chap. XVIII. on PRINCIPAL and SURETY.

(*c*) *Sadler* v. *Nixon*, 5 B. & Ad. 936.

(*d*) *Burnell* v. *Minot*, 4 Moore, 340; *Hutton* v. *Eyre*, 6 Taunt.

tory (*e*). Therefore, one of several joint, or joint and several makers of a note, who pays the whole, may maintain an action against another for contribution (*f*); and he may now, on giving a proper indemnity, sue his companion on the instrument in the creditor's name, and his own payment shall not be pleadable in bar (*g*).

Bank notes.

A bank note is a promissory note, made by a banker, payable to bearer on demand, and intended to circulate as money (*h*).

Bank of England notes.

The term bank note is sometimes used indiscriminately for the note of a country bank, or the note of the Governor and Company of the Bank of England; but, in law books, a bank note is commonly taken to mean a Bank of England note. "Bank notes," says Lord Mansfield, "are not goods, not securities nor documents for debts, nor are they so esteemed; but are treated as money, as cash, in the ordinary course and transactions of business, by the general consent of mankind, which gives them the credit and currency of money, to *all* intents and purposes. They are as much money as guineas themselves are, or any other current coin that is used in common payments as money or cash. They pass by a will which bequeaths all the testator's money or cash, and are never considered as securities for money, but as money itself. On payment of them, whenever a receipt is required, the receipts are always given as for money, not as for securities or notes. So, on bankruptcies, they cannot be followed as identical, and distinguishable from money, but are always considered as money or cash" (*i*). Like money, they cannot, at common law, be taken in execution (*j*), but may now be taken by virtue of the stat. 1 & 2 Vict. c. 110, s. 12.

289; *Holmes* v. *Williamson*, 6 M. & S. 158; *Edgar* v. *Knapp*, 6 Scott's N. R. 707; 5 M. & G. 753, S. C.

(*e*) *Prior* v. *Henbrow*, 8 M. & W. 882.

(*f*) As to contribution between principal and surety, and between co-sureties, see the Chapter on PRINCIPAL and SURETY.

(*g*) 19 & 20 Vict. c. 97, s. 5; *Batchelor* v. *Lawrence*, 30 L. J., C. P. 39; 9 C. B., N. S. 543, S. C.

(*h*) As to the power of the Bank of England and other banks to issue promissory notes, see the Chapter on the CAPACITY OF PARTIES TO A BILL OR NOTE.

(*i*) *Miller* v. *Race*, 1 Burr. 452; *Fleming* v. *Brooke*, 1 Sch. & Lefr. 318; 11 Ves. 662; *Drury* v. *Smith*, 1 P. Wms. 404; *Miller* v. *Miller*, 3 P. Wms. 356; Ambler, 68.

(*j*) *Francis* v. *Nash*, Rep. temp. Hardwicke, 53; *Knight* v. *Criddle*, 9 East, 48; *Armistead* v. *Philpot*, 1 Dougl. 219; *Fieldhouse* v. *Croft*, 4 East, 510.

CHAPTER II.

When a legal tender.

Gold coin was formerly the only legal tender above a certain amount (*k*); bank notes were, nevertheless, a good tender, unless objected to on that account (*l*); but it is enacted, by 3 & 4 Will. 4, c. 98, s. 6, that Bank of England notes shall be a legal tender for all sums above 5*l*., except at the Bank of England or its branches.

Country bank notes.

Formerly, money was kept with goldsmiths, who, about the year 1670, introduced, as receipts for deposits, promissory notes payable to bearer, called Goldsmiths' Notes; the assignable quality of these notes was strenuously denied by Lord Chief Justice Holt, in the reign of Queen Anne. At length, the stat. 3 & 4 Anne, c. 9, made them assignable, like bills. Checks on bankers have now superseded goldsmiths' notes, in London; but bankers' cash notes, or, as they were formerly called, *shop notes*, and country bank notes, are now what goldsmiths' notes were formerly.

When a legal tender.

Country bank notes are also a legal tender, unless objected to, and are considered as cash (*m*).

When money had and received will lie for them.

Assumpsit for money had and received will lie for country bank notes and checks which have been treated as money (*n*), but not otherwise (*o*); for it has been held, that an action for money had and received will not lie against the finder of lost notes unless they have been turned into money, or treated by the defendant as money.

Of the contracting words in a promissory note.

No precise words of contract are essential in a promissory note, provided they amount in legal effect to an unconditional promise to pay. Thus, "I promise to account with A. B. or order for 50*l*., value received by me," has been held a good note within the statute (*p*). So, "I do acknowledge myself to be indebted to A. in 100*l*., to be paid on demand, for value received," was, after solemn argument, held to be a good note within the statute, the words "*to be paid*" amounting to a promise to pay; the Court observing,

(*k*) 56 Geo. 3, c. 68, s. 11.

(*l*) *Wright* v. *Reed*, 3 T. R. 554; *Grigby* v. *Oakes*, 2 B. & P. 526; *Brown* v. *Saul*, 4 Esp. 267.

(*m*) Chitty, 351, 2; *Owenson* v. *Morse*, 7 T. R. 64; *Ward* v. *Evans*, 2 Ld. Raym. 928; *Tiley* v. *Courtier*, K. B. 1817; overruling *Mills* v. *Stafford*, Peake, N. P. 240, n.; *Lockyer* v. *Jones*, Peake, N. P. 240, n.; *Polglass* v. *Oliver*, 2 C. & J. 15; 2 Tyr. 89, S. C.

(*n*) *Pickard* v. *Bankes*, 13 East, 20; *Spratt* v. *Hobhouse*, 4 Bing. 173; 12 Moo. 395, S. C.

(*o*) *Noyes* v. *Price*, Chitty, 354.

(*p*) *Morris* v. *Lee*, 2 Ld. Raym. 1396; 1 Stra. 629; 8 Mod. 362, S. C.

that the same words in a lease would amount to a covenant to pay rent (*q*). And where, for an executed consideration, a note was given, expressed to be "for 20*l.* borrowed and received," but at the end were the words, "which I promise *never* to pay," Lord Macclesfield rejected the word *never* (*r*). For a contract ought to be expounded in that sense in which the party making it apprehended that the other party understood it.

If there be no words amounting to a promise, the instrument is merely evidence of a debt, and may be received as such between the original parties (*s*). Such is the common memorandum I O U (*t*).

(*q*) *Casborne* v. *Dutton*, S. N. P. 401; *Brooks* v. *Elkins*, 2 M. & W. 74. But in *Horne* v. *Redfearn* (4 Bing. N. C. 433; 6 Scott, 260, S. C.), the following instrument was held not to be a promissory note:—"I have received the 20*l.* which I borrowed of you, and I have to be accountable for the same sum with interest.".

In *Jarris* v. *Wilkins*, 7 M. & W. 410, the following instrument was held to be a guarantie, and not a note:—"Sept. 11, 1839. I undertake to pay to Mr. Robert Jarvis the sum of 6*l.* 4*s.* for a suit of clothes ordered by Daniel Page." The Court observed that the expression "ordered" showed that the consideration was executory.

"I, R. J. M., owe Mrs. E. the sum of 6*l.*, which is to be paid by instalments, for rent. Signed, R. J. M." Held not to be a promissory note, as no time was stipulated for the payment of the instalments. *Moffatt* v. *Edwards*, 1 Car. & M. 16.

"Memo. Mr. Sibree has this day deposited with me 500*l.* on the sale of 10,300*l.* 3*l.* per cent. Spanish, to be returned on demand." Held not to be a promissory note. *Sibree* v. *Tripp*, 15 M. & W. 23.

"Borrowed of Mr. J. White the sum of 200*l.* to account for on behalf of the Alliance Club at two months' notice if required," was held not to be a note. *White* v. *North*, 3 Exch. Rep. 689.

"Borrowed, this day, of Mr. John Hyne, Stonehouse, the sum of 100*l.* for one or two months; cheque 100*l.* on the Naval Bank," was held to be a simple acknowledgment, and not a note or agreement. *Hyne* v. *Dewdney*, 21 L. J., Q. B. 278.

The following instrument was held to be a promissory note:—"John Mason, 14th Feb. 1836, borrowed of Mary Ann Mason, his sister, the sum of 14*l.* in cash, a loan, in promise of payment of which I am truly thankful for." *Ellis* v. *Mason*, 7 Dowl. P. C. 598.

A letter in this form is a promissory note:—"Gentlemen, I have received the imperfect books, which, together with the costs overpaid on the settlement of your account, amounts to 80*l.* 7*s.*, which sum I will pay you within two years from this date. I am, Gentlemen, your obedient servant,

"Thos. Williams."

Wheatley v. *Williams*, 1 M. & W. 533.

A promise to pay or cause to be paid is a good note. *Dixon* v. *Nuttal*, 6 C. & P. 320; 1 C., M. & R. 307.

(*r*) 2 Atkyns, 32; *Allen* v. *Mawson*, 4 Camp. 115; Bayley, 5 Ed. 5.

(*s*) *Waynam* v. *Bend*, 1 Camp. 175.

(*t*) *Israel* v. *Israel*, 1 Camp. 499; *Fisher* v. *Leslie*, 1 Esp. 426; *Childers* v. *Boulnois*, D. & R., N. P. 8. But see *Guy* v. *Harris*, Chit. 526, where Lord Eldon held such an instrument to be a pro-

CHAPTER II.

Other matters contained in a note.

A promissory note is not the less a note, because it contains a recital that the maker has deposited title deeds with the payee as a collateral security (*u*), or because it refers to an agreement where it does not appear that the agreement qualifies the note (*v*). But an agreement to give further security in future would invalidate the instrument as a promissory note (*x*).

missory note. But it clearly is not such at this day. See *Tomkins* v. *Ashby*, 6 B. & C. 541; 9 D. & R. 543; 1 M. & M. 32, S. C. See further on this subject Chap. IV. on an I O U.

(*u*) *Wise* v. *Charlton*, 4 A. & E. 786; 6 N. & M. 364; 2 H. & W. 49, S. C.; *Fancourt* v. *Thorne*, 9 Q. B. 312. See, however, *Storm* v. *Stirling*, 3 E. & B. 841. But such a note will generally require a mortgage stamp, which may, however, be impressed on the note after it is made. See further Chap. XXIII. on INTEREST.

(*v*) *Jury* v. *Baker*, 28 L. J., Q. B. 255; E. B. & E. 459, S. C.

(*x*) See Chap. VII. on IRREGULAR INSTRUMENTS.

CHAPTER III.

OF A CHECK ON A BANKER.

What instruments are checks 13
Requisites to bring checks within the exemption of the General Stamp Act . . 14
Effect and penalty of omitting a Stamp on Check, where necessary . . 16
Alteration of the law by recent Acts 16
Amount for which a check may be drawn 17
How transferred 18
Banker's obligation to pay . 18
Time of presentment . . 19
As between Holder and Drawer 19
As between the Holder and his own Banker . . 20
Where the parties do not live in the same place . . 20
As between the Holder and a Transferer who is not a Drawer 20
What amounts to an engagement to pay a check . . 21
Crossed checks 21
Statute relating to crossed checks 22
What a check is evidence of 23
When it amounts to Payment 23
When it may be taken in Payment 24
Whether Holder be Assignee of a chose in action . . 24
Effect of Drawer's death . 24
Of Fraud in filling up checks 24
Branch Banks 25
When several must join in drawing check 25
From what period Customers debited 25
Checks not protestable . . 25
Formerly referred to Master to compute 25
Right to cash a check . . 26
Overdue check 26
Is within Bills of Exchange Acts 26
May be taken in execution . 26
Checks payable to order . 26

What instruments are checks.

A CHECK on a banker is, in legal effect, an inland bill of exchange, drawn on a banker, payable to bearer on demand (*a*). A check is consequently subject, in general, to the rules which regulate the rights and liabilities of parties to bills of exchange. Checks on bankers, however, have of late years come into use so frequent, as commonly to supersede in payments of any considerable amount, not only gold and silver coin, but bank notes themselves. With their universal use have grown up certain usages peculiar to

(*a*) *Keene* v. *Beard*, 8 C. B., N. S. 372. The 16 & 17 Vict. c. 59, introduces a new sort of draft on a banker, payable to order on demand, exempting the banker from liability if the original or any subsequent indorsement be forged: sect. 19. See the observations on this new species of check at the end of the present Chapter.

CHAPTER III.

checks, which usages are now engrafted on the commercial law of the country. Moreover, the Legislature having exempted them from stamp duty, questions have arisen as to what instruments are or are not within the exemption, and as to the consequences of attempts to violate the provisions of the Stamp Acts. In this Chapter it is intended to point out some of those qualities and incidents, which distinguish checks from other bills of exchange. The learned reader will perhaps think that such observations are at present premature, but it has been thought conducive to perspicuity, that the rest of the book should be disembarrassed of distinctions solely applicable to checks, and that a summary of the law peculiarly relating to them should be attempted in the same part of the work, where observations relating peculiarly to bills or notes are respectively to be found. It is hoped that any obscurity, caused by anticipating what is to follow, will be removed by turning to subsequent Chapters.

Stamps.

Checks on bankers have been for many years and are now, more than ever, the most powerful instruments for economizing the currency both metallic and paper. They were, therefore, until recently, exempted from all stamp duty, and are now subject to a duty of one penny only.

Requisites to bring checks within the exemption of the General Stamp Act.

The General Stamp Act (*b*), while it subjected bills in general to stamps, exempted from all stamp duties:—

All drafts or orders for the payment of any sum of money to the bearer on demand, and drawn upon any banker or bankers, or any person or persons acting as a banker, who shall reside or transact the business of a banker within *ten miles* (afterwards *fifteen miles*, 9 Geo. 4, c. 49, s. 15) (*c*), of the place where such drafts or orders shall be issued (*d*), provided such place shall be specified in such drafts or orders, and provided the same shall bear date on or before the day on which the same shall be issued, and provided the same do not direct the payment to be made by bills or promissory notes.

And the 16 & 17 Vict. c. 59 (Schedule), which subjected drafts or orders for the payment of any sum of money to the bearer on demand to a duty of one penny, contains the same exemption.

But, by the 17 & 18 Vict. c. 83, s. 7, it is enacted, that no

(*b*) 55 Geo. 3, c. 184, Sched.

(*c*) If a defendant wish to avail himself of this defence, he should plead that he did not make the check declared on. *McDowall* v. *Lyster*, 2 M. & W. 52; *Field* v. *Woods*, 7 Ad. & E. 114; 2 N. & P. 117; 6 Dowl. 23, S. C.

(*d*) What not an issuing, *Ex parte Bignold*, 2 Mont. & Ayr. 663; 1 Deac. 712, S. C.; Chitty, 118.

draft or order so exempted shall, unless the same be duly stamped as a draft or order, be remitted or sent to any place beyond the distance of fifteen miles, in a direct line from the bank or place at which the same is made payable, or be received in payment or as a security, or be otherwise negotiated or circulated at any place beyond the said distance; and if any person shall remit or send any draft or order not duly stamped as aforesaid, to any place beyond the distance aforesaid, or shall receive the same in payment or as a security, or in any manner negotiate or circulate the same at any such last-mentioned place, he shall forfeit the sum of fifty pounds.

Section 8 enables any person who shall receive any such draft or order at any place within the distance of fifteen miles, from the bank or place at which the same is made payable, which draft or order shall have been lawfully issued unstamped, to affix thereto a proper adhesive stamp, and to cancel such stamp by writing thereon his name or the initial letters of his name, and thereupon such draft or order may lawfully be received and negotiated at any place beyond the distance of fifteen miles.

Adhesive stamps denoting the duty of one penny may be used for receipts or drafts, without regard to the special appropriation thereof (*e*).

In order to bring checks within the exemption, they must have been drawn on a *banker* (*f*), must have specified truly the place where actually drawn (*g*), and that place must have been within fifteen miles in a direct line from the banker's place of business, they must have been payable to bearer (*h*) on demand, must not have been post-

(*e*) Sect. 10. See also 16 & 17 Vict. c. 59, ss. 3 & 4.

(*f*) *Castleman* v. *Ray*, 2 Bos. & P. 383.

(*g*) *Walters* v. *Brogden*, 1 Y. & J. 457; *Bopart* v. *Hicks*, 3 Exch. 1; 8 Q. B. 674, S. C. Where a person residing in a country house four miles from Llanelly, actually dated it as if drawn at Llanelly, it was held that the check was void for want of a stamp. *Walters* v. *Brogden*, 1 Y. & J. 457; *Field* v. *Woods*, 7 Ad. & Ell. 114; 2 N. & P. 117; 6 Dowl. 23, S. C.; and see *Rew* v. *Pooley*, 3 B. & P. 311; see also *Strickland* v. *Mansfield*, 8 Q. B. 675, where it was held, that the superscription "DORCHESTER OLD BANK, ESTABLISHED IN 1786," *printed* on a check was a sufficient designation of the place where drawn, in the absence of proof that it was not drawn there. But a check addressed to Messrs. C. & Co., Bankers, Lutterworth, was held not to designate the place where the check was drawn. *Bond* v. *Warden*, 1 Collyer, 583; and a check headed "Oxford, Worcester, and Wolverhampton Railway," but not superscribed as drawn at any place, was held void. *Lord Ward* v. *Oxford Railway Company*, 2 De G., Mac. & G. 750.

(*h*) *Rew* v. *Yates*, Moo. C. C. 170; Carrington's Criminal Law,

CHAPTER III.

dated (*i*), nor have directed the payment to be made by bills or notes (*k*).

Effect and penalty of omitting stamp on a check, where necessary.

The penalties attached to checks made under colour of this exemption, but not falling strictly within it, were extremely severe. For the 55 Geo. 3, c. 184, s. 13, enacts that if any person shall make or issue any check (*l*) or draft on a banker, payable to bearer on demand, not duly stamped, and not falling in every respect within the exemption, the drawer shall forfeit 100*l.*, any person *knowingly* taking it 20*l.*, the banker *knowingly* paying it 100*l.*; and the banker shall not be allowed it in account against the persons *by* whom or *for* whom it was drawn, or against any person claiming under them respectively (*m*). And the statute 17 & 18 Vict. c. 83, s. 7, imposes, as we have seen, a penalty of 50*l.* for the circulation of a check beyond the fifteen miles, except in cases where a stamp is duly impressed or affixed.

Where the defendants, knowing a check to be post-dated, and therefore void, and that the drawers were insolvent, presented it for payment to the bankers on whom it was drawn, who without knowledge of these facts paid the amount, though they had no funds of the drawer's in their hands at the time, but expected some in the course of the day, it was held that the bankers were entitled to recover the money back in an action for money had and received (*n*).

Alteration of the law by recent Acts.

Such was the general effect of the law down to the year 1858; but after the 24th May, 1858, all drafts or orders for the payment of money to the bearer on demand, which were exempt from stamp duty under these provisions, are, by the 21 & 22 Vict. c. 20, s. 1, made chargeable with the duty of one penny. All bankers' checks are, therefore, now subject to a stamp of one penny wherever made, and wherever the banker may live or carry on business.

3rd ed. 273, S. C. The twelve Judges there decided that a check payable to D. F. J., and not to bearer, was not within the exception in the Stamp Act in favour of checks, and ought to have been stamped as a bill, and not being so, was not a "valuable security" within the 7 & 8 Geo. 4, c. 29, s. 5, and that an indictment for larceny was not sustainable. But a man who steals a void check may be convicted of larceny of a piece of paper. *Reg.* v. *Perry*, 1 Car. & K. 725.

(*i*) *Allen* v. *Keeves*, 1 East, 435; 3 Esp. 281, S. C.; *Whitwell* v. *Bennett*, 3 B. & P. 559.

(*k*) 55 Geo. 3, c. 184, Sched. Part 1, and 9 Geo. 3, c. 49, s. 15.

(*l*) *Ex parte Bignold*, supra.

(*m*) See *Green* v. *Allday*, 1 Gale, 218.

(*n*) *Martin* v. *Morgan*, Gow, 123; 1 B. & B. 289; 3 Moore, 635, S. C.

By sect. 18 of the 23 & 24 Vict. c. 111, bankers or persons acting as such, into whose hands a banker's draft or order shall come unstamped, may affix thereto the necessary adhesive stamp, cancel the same, and charge the drawer with the stamp; but the drawer is not thereby relieved from the penalty. It seems, that a check may now be post-dated, may be drawn at a place beyond the fifteen miles, and need not specify the place where drawn (*o*).

Amount for which a check may be drawn.

A check may now be drawn or negotiated for any sum of money large or small.

Formerly, a check for less than the sum of 20*s.* was absolutely void, and the uttering or negotiating such an instrument was an offence subjecting the offender to a penalty of 20*l.*, mitigable to 5*l.* (*p*). So, also, it was an offence to utter a check on which less than 20*s.* remained due (*q*). And while the 17 Geo. 3, c. 30, was in force and not controlled by any other statute, a check could not be drawn for a sum under 5*l.* But the 7 Geo. 4, c. 6, which repealed the act repealing the 17 Geo. 3, c. 30, and consequently revived that act, enacted (*r*), that nothing in that latter act (*s*) contained should extend to any draft drawn by a man on his own banker, *for money held by that banker to the use of the drawer.*

Checks payable to bearer or order under 20*s.*

By the 23 & 24 Vict. c. 111, s. 19, it is enacted that, notwithstanding anything in any act of parliament contained to the contrary, it shall be lawful for any person to draw upon his banker who shall *bonâ fide* hold money to or for his use any draft or order for the payment to the bearer, or to order on demand, of any sum of money less than 20*s.* Therefore a check for an amount under 20*s.* is good under this act, but nevertheless it may be illegal to utter such a check where a

(*o*) Looking at the fact that the statutory enactment, 55 Geo. 3, c. 184, s. 13, struck expressly at frauds and evasions of the duties under colour of the exemption in favour of checks on bankers, which exemption checks no longer enjoy, and comparing the statutes 17 Geo. 3, c. 30, repealed so far as relates to ordinary checks on bankers by the 17 & 18 Vict. c. 83, s. 9, and the 55 Geo. 3, c. 184, s. 18, prohibiting printed dates, repealed by the 23 & 24 Vict. c. 111, s. 19. Accordingly it has been held that a check payable to order may be post-dated (*Whistler* v. *Forster*, 32 L. J., C. P. 161; 14 C. B., N. S. 248, S. C.). The same point has been decided as to a check payable to bearer. *Austin* v. *Bunyard*, 34 L. J., 217 (Q. B.). But in this case the holder had no notice of the post-dating. *Forster* v. *Mackworth*, L. R., 2 Ex. 163; 36 L. J. 94, where a post-dated cheque was held equivalent to a bill of exchange for a like period.

(*p*) 48 Geo. 3, c. 88, s. 8.

(*q*) Ibid.

(*r*) Sect. 9.

(*s*) 7 Geo. 4, c. 6.

CHAPTER III.

man has no balance at his banker's, though the banker may be likely to pay it (*t*).

Transfer of checks.

A check, being drawn payable to bearer, is transferable by mere delivery, but it may be indorsed, for indorsement includes delivery (*u*).

The banker's obligation to pay checks.

Generally speaking, the drawee of a bill is not liable till acceptance. But a banker, having in his hands effects of his customer, is an exception to this rule (*v*); he is bound within a reasonable time after he has received the money, to pay his customer's checks, and is liable to an action at the suit of the customer if he do not. For there is an implied contract between banker and customer, that the banker shall pay the customer's checks: and the customer's credit may be seriously impaired by a refusal. M. kept his account with Williams & Co., bankers. One day in the morning, the balance in their hands due to M. was 69*l.* 16*s.* 6*d.* About one o'clock on the same day a 40*l.* Bank of England note was paid into M.'s account; a little after three o'clock, a check, drawn by M. for 87*l.* 7*s.* 6*d.* was presented. The clerk, after having referred to a book, said, there were not sufficient assets, but that the check might, probably, go through the clearing house. On the following day the check was paid. M. brought a special action on the case against the bankers. No actual damage was proved, but the jury found a verdict for the plaintiff with nominal damages. On a rule for a new trial, "I cannot forbear to observe," says Lord Tenterden, "that it is a discredit to a person, and therefore injurious, in fact, to have a draft refused payment for so small a sum; for it shows that the banker had very little confidence in the customer. It is an act particularly calculated to be injurious to a person in trade. My judgment in this case, however, proceeds on the ground, that the action is founded on a contract between the plaintiff and the bankers - that the bankers, whenever they should have money in their hands belonging to the plaintiff, or within a reasonable time after they should have received such money, would pay his checks: and there having been a breach of such contract, the plaintiff is entitled to recover damages." Although no evidence is given that the plaintiff has sustained any special damage, the jury ought not to limit their verdict to nominal damages, but should give such tem-

(*t*) The Act 26 & 27 Vict. c. 40, s. 1, legalizes all checks under 40*s.* without any restriction, but that Act is a temporary one. See Appendix.

(*u*) *Keene* v. *Beard*, 29 L. J., C. P. 287: 8 C. B., N. S. 372.

(*v*) *Marzetti* v. *Williams*, 1 B. Ad. 415; 1 Tyr. 77, n. (*b*), S. C.

perate damages as they may judge to be a reasonable compensation for the injury the plaintiff must have sustained from the dishonour of his check (*w*).

But if the funds in the bankers' hands have been applied to the payment of the customer's acceptance, made payable at the bankers, though without any further authority, that is a defence to an action for dishonouring the check (*x*).

Time of presentment for payment.

We have already observed, that checks are in legal effect inland bills of exchange, payable to bearer on demand; and we shall hereafter see, that an ordinary bill of exchange, payable on demand, must be presented for payment, or if the parties live at a distance, forwarded for presentment within a reasonable time, which is generally held to comprehend the day after it is issued.

Such also is the general rule as to the presentment of checks. "The result of the cases," says Tindal, C. J., "from *Rickford* v. *Ridge* to *Boddington* v. *Schlencker*, is, that the party receiving a check has till the following day to present it, where there are the ordinary means of doing so"(*y*). Formerly, it was held, that the check must be presented on the *morning* of the next day; it is now, however, firmly established, that the holder has the whole of the banking hours of the next day within which to present it (*z*). Government checks are not payable at the Bank of England after three o'clock (*a*).

Liability of drawer on delay of presentment.

But there is one material difference between the liability of the *drawer* of a check and the drawer of a bill payable on demand.

The drawer of a check is not discharged by the holder's failure to present in due time, unless the drawer have sus-

(*w*) *Rollin* v. *Steward*, 14 C. B. 595. In this case, tried at Norwich, the plaintiff recovered a verdict for 500*l*., which was, however, reduced at the recommendation of the Court. And a banker having securities in his hands, though the cash balance in his pass-book was against the customer, has been held liable, where in a previous course of similar dealing checks had been paid. *Cumming* v. *Shand*, 29 L. J., Exch. 129.

(*x*) *Keymer* v. *Laurie*, 18 L. J., Q. B. 218.

(*y*) *Moule* v. *Brown*, 4 Bing. N. Ca. 268; 5 Scott, 694, S. C.; *Bailey* v. *Bodenham*, 16 C. B., N. S. 288; 33 L. J., C. P. 252, S. C. Presentment to the bankers' London agent is not sufficient, though named in the printed form of the check (*ibid.*) It is doubtful whether sending a check in a letter to the drawees is a sufficient presentment (*ibid.*)

(*z*) *Pocklington* v. *Sylvester*, 817; Chitty, 385; *Robson* v. *Bennett*, 2 Taunt. 388; *Rickford* v. *Ridge*, 2 Camp. 537.

(*a*) 4 & 5 Will. 4, c. 15, s. 21.

CHAPTER III.

tained from the delay actual prejudice, as by the failure of the banker (*b*). The check is an absolute appropriation of a sum of money in the banker's hands to lie till called for; but by delay the holder takes the risk of the bank's failure (*c*), or revocation of their authority to pay by death of drawer (*d*).

As between the holder and his own banker.

If the payee of the check pay it into his bankers living in the same place that they may present it, the bankers may be, as between their customer and the drawer, still bound to present it on the day after it was originally issued. But as between their customer and themselves they may be bound to present it earlier, or justified in postponing the presentment later (*e*).

Where the parties do not live in the same place.

If the party receiving the check from the drawer do not live in the same place with the drawee, he should send it to his banker or other agent by the next day's post, and they should present it on the day after they have received it (*f*). The banker should send it direct to the drawee, and cannot postpone the time of presentment by circulating it through agents or branches of the bank (*g*). He must not keep it till the third day, and then present it, though by such a course it reach the drawee as soon as it would have done had it been dispatched by post in the regular course (*h*).

As between the holder and a transferer who is not the drawer.

But where a check, instead of being presented for payment in due course, is transferred and circulates through several hands, it is conceived that there is a distinction between the time of presentment necessary as against the original drawer, in the event of the banker's insolvency, and the time necessary to charge the person from whom the

(*b*) *Serle* v. *Norton*, 2 Mood. & Rob. 401; *Alexander* v. *Burchfield*, 3 Scott, N. R. 555; 7 M. & G. 1067, S. C.; *Robinson* v. *Hawksford*, 9 Q. B. 52; *Laws* v. *Rand*, 27 L. J., C. P. 76; 3 C. B., N. S. 442, S. C.

(*c*) See the observations of Chancellor Kent, 3 Com. 104. These views have, in America, as well as in England, been confirmed by judicial decision; *Daniels* v. *Kyle*, 1 Kelly, 304. See Byles on Bills, 5th American edition, p. 93.

(*d*) See *Bromley* v. *Brunton*, L. R., 5 Eq. 275; *Hewet* v. *Kaye*, 5 Eq. 198; and Chap. XI., DONATIO MORTIS CAUSA, and post, p. 24.

(*e*) *Boddington* v. *Schlencker*, 4 B. & Ad. 752; 1 N. & M. 540, S. C.; *Alexander* v. *Burchfield*, 1 Car. & M. 75; 3 Scott, N. R. 555; 7 M. & G. 1067, S. C.; *Hare* v. *Henty*, 30 L. J., C. P. 302.

(*f*) *Rickford* v. *Ridge*, 2 Camp. 537; *Bond* v. *Warden*, 1 Collyer, 583; *Hare* v. *Henty*, 30 L. J., C. P. 302. This rule applies also *primâ facie* between banker and customer (*ibid.*)

(*g*) *Moule* v. *Brown*, 4 Bing. N. Ca. 266; 5 Scott, 694, S. C.

(*h*) *Beaching* v. *Gower*, Holt's N. P. Ca. 315.

check was immediately received. The liability of the drawer cannot, it is apprehended, be enlarged, by circulating the check, and, therefore, in order to charge *him*, if the banker fail, the check, in whose hands soever it be, must be presented within the period within which the payee or first holder must have presented it, but as against the party transferring the check to the holder, it is sufficient, whatever be the date of the check, to present it or forward it for presentment on the day next after the transfer.

As to the consequences of non-presentment, the circumstances which will be evidence of presentment, or which will excuse or waive non-presentment, the reader is referred to the Chapter on PRESENTMENT FOR PAYMENT.

What amounts to an engagement by the drawee to pay a check.

Checks, being intended for immediate payment on being presented, are not usually accepted. It has been said, however, that the custom of London bankers to mark checks as good is equivalent to acceptance, and binds the banker to pay the checks so marked (*i*). And no doubt, before the recent statute, the mark was an acceptance of which any holder of the check might have availed himself, provided the mark amounted to a writing within the 1 & 2 Geo. 4, c. 78, s. 2. But now, by the 19 & 20 Vict. c. 97, s. 6, an acceptance must be signed. If it so happen that the drawee of the check is the banker of the holder, as well as of the drawer, no promise by the banker to pay the check will be implied by his receiving the check from the holder without observation, and keeping it till the following day (*j*), for *primâ facie* he will be taken to have received it as the holder's agent (*k*).

Crossed checks.

It is now and has long been a common practice, not only in the city of London but throughout England, to write across the face of a check the name of a banker. The *meaning* of this crossing was to direct the drawees to pay the check only to *the* banker whose name was written across; and the *object* was to invalidate the payment to a wrongful holder in case of loss: but it has been held that at common law the *effect* is to direct the drawees to pay the check not to any particular banker, but only to *some* banker, and not to restrict its negotiability. Therefore, as between the banker and his customer, the circumstance of the banker paying a crossed check, otherwise than through another banker, is at common law strong evidence of negligence on

(*i*) *Robson* v. *Bennett*, 2 Taunt. 388; and see 2 M. & Rob. 454, note.

(*j*) *Boyd* v. *Emmerson*, 2 A. & E. 184.

(*k*) And see *Kilsby* v. *Williams*, 5 B. & Ald. 816; 1 D. & R. 476, S. C.

CHAPTER III.

the part of the banker, rendering him responsible to his customer (*l*). The holder may at common law erase the name of the banker and either substitute that of another banker, or leave the words *and Co.* remaining alone (*m*) It is also not unusual to write the words *and Co.*, only, in the first instance, leaving the particular banker's name to be filled up afterwards or not, so as to insure the presentment by some banker or other (*n*).

Statute 19 & 20 Vict. as to crossed checks.

But the 19 & 20 Vict. c. 25 recently enacted, that in every case where a draft on any banker made payable to bearer or to order on demand bears across its face an addition of the name of any banker, or of the words "and Company," in full or abbreviated, either of such additions shall have the force of a direction to the bankers, that it is to be paid only to or through *some* banker, and the same shall be payable only to, or through, *some* banker.

The legal effect of this statute on crossed checks payable to bearer should appear to have been very inconsiderable. Before the statute payment otherwise than through some banker was strong evidence of negligence, and therefore practically an invalid payment. Since the statute a payment otherwise than through some banker is invalid as matter of law. The negotiability of crossed checks, which has been found extremely convenient in business, seems to have been left as it was before the act.

On the construction of this statute, it was held by the Court of Common Pleas, though not without much hesitation, that the crossing was no part of the check, that its unauthorized and fraudulent obliteration was no forgery of the check, and therefore that the payment, without negligence, of a check, the crossing whereof had been fraudulently obliterated, to a holder, not being a banker, was, as between the banker the drawee and his customer the drawer, a good payment (*o*).

(*l*) *Bellamy* v. *Majoribanks*, 7 Exch. 389; *Carlon* v. *Ireland*, 25 Law J., Q. B. 113; 5 E. & B. 765, S. C.

(*m*) *Stewart* v. *Lee*, 1 M. & M. 158; *Bellamy* v. *Majoribanks*, supra. But see now 21 & 22 Vict. c. 79, infra.

(*n*) *Boddington* v. *Schlencker*, 4 B. & Ad. 752; 1 N. & M. 540, S. C.; *Carlon* v. *Ireland*, supra. C. drew a check on his banker, payable to A. and B., assignees of C., or bearer, and wrote the name of their banker across it. B., who had another private account with the banker, paid the check into that account; it was held, that the bankers were justified in applying it to that account, the drawer's writing the name of the bankers of the payees of the check across it not being, according to the custom of trade, information to the bankers that the money was the money of the payees.

(*o*) *Simmons* v. *Taylor*, 27 L. J. 45; 4 C. B., N. S. 463.

This decision introduced a further legislative alteration in the law of crossed checks.

Statute 21 & 22 Vict. c. 79.

The statute 21 & 22 Vict. c. 79, ss. 1, 3, makes the crossing a part of the check, and the fraudulent obliteration or alteration of the crossing, felony.

But the statute recognizes the right of a lawful holder to cross a check, and on a check already crossed with the words "& Co." to prefix the name of any banker.

It introduces, however, this alteration of the law, that if a check be once crossed with the name of a particular banker, it is thenceforth payable only through that banker.

It recognizes the decision of the Court of Common Pleas in favour of the banker, by enacting that where a crossing has been so altered or obliterated as not plainly to appear, there a wrong payment in consequence, if without the fraud or negligence of the banker, shall not be questioned.

The legislation on this subject still seems to leave the result of the judicial application of the common law to crossed checks much as it stood originally, except that the crossing is made part of the check; that the payment of a crossed check otherwise than through a banker is not merely strong evidence of negligence, but is a void payment; and that where a particular banker is named in the crossing, his name must not be erased, and the payment must be through that banker.

What a check is evidence of.

A check presented and paid is no evidence of money lent or advanced by the banker to the customer (*p*). On the contrary, it is *primâ facie* evidence of the repayment, to the amount of the check by the banker to the customer, of money previously lodged by the customer in the banker's hands. A check, not presented, is not evidence of money previously lent by the drawer to the payee (*q*). In other words, the mere circumstance of one man drawing a check in favour of another is no evidence of a debt due from the drawer.

When a check amounts to payment.

A check, unless dishonoured, is payment (*r*). But upon a question whether a debt have been paid, the mere production of a check drawn by the debtor in favour of the creditor and paid by the banker, is no evidence of payment (*s*). It

(*p*) *Fletcher* v. *Manning*, 12 M. & W. 571.

(*q*) *Pearce* v. *Davis*, 1 M. & Rob. 365; and see *Aubert* v. *Walsh*, 4 Taunt. 293; *Cary* v. *Gerrish*, 4 Esp. 9.

(*r*) *Pearce* v. *Davis*, 1 M. & Rob. 365; see *Moore* v. *Barthrop*, 1 B. & C. 5; 2 D. & R. 25, S. C.

(*s*) *Egg* v. *Barnett*, 3 Esp. 196; *Pearce* v. *Davis*, supra; *Lloyd* v. *Sandilands*, Gow, 15.

See Bridges v Gascoigne

CHAPTER III.

must be further shown that the check passed through the creditor's hands. For this purpose it is prudent to cause the payee to write his name across the check or to indorse it (*t*). But it is not necessary to go on and show that the debtor paid the check to the creditor (*u*).

When it may be taken in payment.

When the acceptor or drawee of a bill proposes to pay by a check, the holder should not, in strictness, give up the bill till the check is paid (*v*). It has, however, been held that the holder is not guilty of neglect in giving up the bill before the check is paid (*x*); but it is believed not to be usual at this day with London bankers to exchange bills for checks, and it is doubtful whether they would now be protected in so doing. If a creditor, however, in payment of any other debt than a bill or note, take a check, and the banker fail, or the check be dishonoured, the creditor's remedies remain entire (*y*).

Whether holder of check be assignee of a chose in action.

It has been said that the holder of an unpaid check, as assignee of a chose in action, has an equitable claim on the drawee, and in the event of his bankruptcy may prove under the fiat (*z*). But in America it has been held that a check is not an equitable transfer by the drawer of a part of the debt due to him from the banker (*a*).

Effect of drawer's death.

It seems that the death of the drawer of a check is a countermand of the banker's authority to pay it. But that if the banker do pay the check before notice of the death, the payment is good (*b*).

Of fraud in filling up checks.

If the sum for which the customer drew the check be fraudulently altered and increased, and the banker pay the larger sum, he cannot charge his customer with the excess, but

(*t*) *Aubert* v. *Walsh*, 4 Taunt. 293; *Lloyd* v. *Sandilands*, Gow, 15.

(*u*) *Mountford* v. *Harper*, 16 M. & W. 825; *Boswell* v. *Smith*, 6 C. & P. 60.

(*v*) Marius, 21; *Ward* v. *Evans*, 12 Mod. 521; *Vernon* v. *Boverie*, 2 Show. 296.

(*x*) *Russell* v. *Hankey*, 6 T. R. 13; *Ridley* v. *Blackett*, Peake's Add. C. 62.

(*y*) *Everett* v. *Collins*, 2 Camp. 515; *Dent* v. *Dunn*, 3 Camp. 296; *Marsh* v. *Pedder*, Holt, 72; 4 Camp. 257, S. C.; *Tapley* v. *Martens*, 8 T. R. 451; *Wyatt* v. *Marquis of Hertford*, 3 East, 147.

(*z*) In Fry and Chapman's bankruptcy, in the year 1829, several holders of checks on the bankrupts claimed to prove, alleging that they were equitable assignees of choses in action. The commissioners took time to consider, and afterwards disallowed the claim.

(*a*) *Ballard* v. *Randall*, 1 Gray, 605.

(*b*) *Tate* v. *Hilbert*, 2 Ves. jun. 118.

must bear the loss (*c*). But should any act of the drawer himself have facilitated or given occasion to the forgery, he must bear the loss himself. A customer of a banker on leaving home, entrusted to his wife several blank forms of checks, signed by himself, and desired her to fill them up according to the exigency of his business. She filled up one with the words *fifty-two pounds two shillings*, beginning the word *fifty* with a small letter in the middle of a line. The figures 52 : 2 were also placed at a considerable distance to the right of the printed £. She gave the check, thus filled up, to her husband's clerk, to get the money. He before presenting it, inserted the words, "*three hundred*" before the word *fifty*, and the figure 3 between the printed £ and the figures 52 : 2, so that it then appeared to be a check for 352 : 2. It was presented, and the bankers paid it. Held, that the improper mode of filling up the check had invited the forgery, and, therefore, that the loss fell on the customer and not on the banker (*d*).

Branch banks.

Branches of the same banking company in different towns are for many purposes distinct. They may give notices of dishonour to each other, and a check upon one, when cashed by another, may be considered as transferred and not paid (*e*).

When several must join in drawing check.

When a plurality of persons, not being partners in trade, have money in a bank, they must each sign the check. If one abscond, equity will relieve the others, and assist them to get the money (*f*).

From what period bankers should debit their customers with checks.

It has not been unusual for bankers to enter checks in the pass-book as of the date when they were drawn, and not as of the date when they were actually paid, and to calculate interest accordingly. But a banker should debit his customer, not from the date of the check but from the time of payment (*g*).

Checks not protestable.

The 9 & 10 Will. 3, c. 17, applies only to bills of exchange payable *after date*. Checks, therefore, are not protestable (*h*).

(*c*) *Hall* v. *Fuller*, 5 B. & C. 750; 8 D. & R. 464, S. C.; *Smith* v. *Mercer*, 6 Taunt. 76; 1 Marsh. 453, S. C.

(*d*) *Young* v. *Grote*, 4 Bing. 253; 12 Moore, 484, S. C. See observations on this important case, post.

(*e*) *Clode* v. *Bailey*, 12 M. & W. 51; *Woodland* v. *Fear*, 26 L. J., Q. B. 202; 7 E. & B. 519, S. C.

(*f*) *Ex parte Hunter*, 2 Rose, 363. See post, Chap. XV., on PAYMENT.

(*g*) *Goodbody* v. *Foster*, Camb. Sum. Ass. 1831, Lyndhurst, C. B.

(*h*) *Grant* v. *Vaughan*, 3 Burr. 1516.

CHAPTER III.

Might formerly be referred to the Master to compute.

A check, like a bill or note, might formerly, it seems, be referred to the Master to compute principal and interest (*i*). But by the 15 & 16 Vict. c. 76, s. 92, this is rendered unnecessary, and in actions where the plaintiff seeks to recover a debt or liquidated demand in money, judgment by default is final (*k*).

Right to cash a check.

A stakeholder who cashes a check deposited with him is not, if the parties agreed to treat the check as money, guilty of a breach of duty (*l*).

Overdue check.

As to the title of a man receiving money on an overdue check which had been lost, see the Chapter on TRANSFER.

Within Bills of Exchange Act.

A check is within the Bills of Exchange Act, 18 & 19 Vict. c. 67 (*m*).

Execution.

A check may be taken in execution (*n*).

Checks payable to order.

The Statute 16 & 17 Vict. c. 59, s. 19, introduces a new description of draft on a banker, differing in some respects from a check, and in others from a bill of exchange. The enactment applies to a draft on a banker payable *to order* on demand. The statute enacts, that the banker who pays the bearer is not to be responsible for the genuineness of the indorsement, as he would be if it were an ordinary bill of exchange, but on the other hand the bearer cannot charge the drawer without making title through the first indorsement as he could on an ordinary check payable to bearer.

A banker's draft payable to order is now very commonly used for remittances by post or otherwise. No innocent transferee for value can succeed in an action against the drawer, unless he derive title through the payee's indorsement. The drawer is therefore, in an action against himself on the check, protected by the ordinary consequences of forgery civil and criminal. While in an action by himself against his own banker for the balance of his account, the banker, when he sets up as an answer the payment of the

(*i*) See *Bentham* v. *Lord Chesterfield*, 5 Scott, 417.
(*k*) Sect. 93.
(*l*) *Wilkinson* v. *Godefrey*, 9 Ad. & E. 536.
(*m*) *Eyre* v. *Waller*, 29 L. J., Ex. 246; 5 H. & N. 460, S. C.
(*n*) 1 & 2 Vict. c. 110, s. 12; *Watts* v. *Jefferies*, 3 Mac. & G. 422; 15 Jur. 435, S. C.

check, is at all events in no better position than he would have occupied had the check been originally made payable to bearer. Indeed, cases may be imagined in which the forged indorsement may assist the drawer in proving collusion or gross negligence against the banker.

Checks payable to bearer may be crossed like other checks, and, it is conceived, with the same consequences (*o*).

(*o*) 19 & 20 Vict. c. 25; 21 & 22 Vict. c. 79.

CHAPTER IV.

OF AN I O U.

What it is . . .	28	*Need not be addressed to the Creditor* . . .	29
Requires no Stamp . .	28	*Bill in Equity to discover Consideration* . .	29
Unless it amounts to a Note or Agreement . .	29	*To restrain an Action* .	29

CHAPTER IV.

What it is.

A MERE acknowledgment of a debt does not amount to a promissory note.

Such an acknowledgment is frequently made in an abbreviated form, thus,

London, 1st January, 1866.

Mr. A. B.

I O U £100.

C. D.

An acknowledgment of a debt in this form is called an I O U. It is evidence of an account stated but not of money lent (*a*).

Requires no stamp.

Not amounting to a promissory note (*b*), and being merely evidence of a debt due by virtue of some antecedent contract, it requires no stamp (*c*). Nor indeed is a stamp required for any instrument which is merely an acknowledgment of money deposited to be accounted for, and not a receipt for money antecedently due (*d*). Therefore a paper stating that the party signing it had certain bills in his hands, which he held to get discounted or return on demand, requires no stamp (*e*).

Unless it amount to a note or agreement.

But if the I O U contain an agreement that it is to be paid on a given day it will be a promissory note, and must

(*a*) *Fesenmayer* v. *Adcock*, 16 M. & W. 449.

(*b*) But if the consideration be stated, it has been held in America to be a promissory note. *Fleming* v. *Burge*, 6 Alabama, 373.

(*c*) *Fisher* v. *Leslie*, 1 Esp. 425; *Israel* v. *Israel*, 1 Camp. 499; *Childers* v. *Boulnois*, D. & R., N. P. Ca. 8; *Beecking* v. *Westbrook*, 8 M. & W. 412.

(*d*) *Tompkins* v. *Ashby*, 6 B. & C. 541; 9 D. & R. 543; 1 M. & M. 32, S. C.; *Casborne* v. *Dutton*, Selwyn's N. P. 381, 9th ed.; *Payne* v. *Jenkins*, 4 C. & P. 324.

(*e*) *Mullett* v. *Hutchison*, 3 C. & P. 92; 7 B. & C. 639, S. C.; *Langdon* v. *Wilson*, 2 Man. & R. 10; *Williamson* v. *Bennett*, 2 Camp. 417; *Horne* v. *Redfearn*, 4 Bing. N. Ca. 433; 6 Scott, 260, S. C.

be stamped as such. And if the contracting words be such as to make it not a promissory note, but an agreement, it must be stamped accordingly (*f*), unless it be under 5*l.* in amount (*g*).

The following instrument was held to be a mere I O U, not to be a promissory note, and to require no stamp: "1839, Nov. 11, I O U forty-five pounds thirteen shillings, which I borrowed of Mrs. Melanotte, and to pay her five per cent. till paid" (*h*). An instrument in this form, "I O Mr. John Gould the sum of 200*l.* for value received," requires no stamp (*i*).

It is conceived that a mere I O U, given by a surety for the debt of another man, is void by the Statute of Frauds (*k*). But perhaps the Mercantile Law Amendment Act (19 & 20 Vict. c. 97, s. 3), which removes the necessity of the consideration appearing in writing, may obviate the objection (*l*).

Need not be addressed to the creditor.

An I O U ought regularly to be addressed to the creditor by name; but though not addressed to any one it will be evidence for the plaintiff, if produced by him (*m*). This rule was convenient and safe. For, before the alteration of the law making parties to the action competent witnesses, if the I O U were given (as it often is) when no one but the plaintiff and defendant were present, it would have been impossible for the plaintiff to prove how he became possessed of it, but if the I O U were given to a third party the defendant had ordinarily the means of proving it.

Bill to discover consideration.

It has been held that a bill in equity will lie to discover whether an I O U were given for a gaming debt (*n*).

To restrain an action.

There are cases where the Court will restrain an action on an I O U (*o*).

(*f*) *Brooks* v. *Elkins*, 2 M. & W. 74.

(*g*) *Evans* v. *Phillpotts*, 9 C. & P. 270; 23 Vict. c. 15.

(*h*) *Melanotte* v. *Teasdale*, 13 M. & W. 216; *Smith* v. *Smith*, 1 F. & F. 539.

(*i*) *Gould* v. *Coombs*, 14 L. J., C. P. 175; 1 C. B. 543, S. C.

(*k*) So held by the Court of Exchequer, in 1845. Admitted by counsel to be so. And see *Gould* v. *Coombs*, 14 L. J., C. P. 175; 1 C. B. 550.

(*l*) An I O U jointly signed by debtor and surety was held evidence of a joint account stated with creditor. *Buck* v. *Hurst*, L. R., 1 C. P. 297.

(*m*) *Curtis* v. *Rickards*, 1 M. & G. 46; 1 Scott, N. R. 155; *Douglas* v. *Holme*, 12 A. & E. 146; *Fisher* v. *Leslie*, 1 Esp. 427; *Fesenmayer* v. *Adcock*, 16 M. & W. 449.

(*n*) *Wilkinson* v. *L'Eaugier*, 2 Y. & Col. 366.

(*o*) *Quarrier* v. *Colston*, 12 L. J., Ch. 57; 6 Jur. 959.

CHAPTER V.

OF THE CAPACITY OF CONTRACTING PARTIES TO A BILL OR NOTE.

AGENTS 31
Who may be an Agent . 31
Special Agent and General Agent 31
Actual and ostensible Authority 31
How Agent appointed . . 31
Procuration . . . 33
When Authority inferred . 33
To indorse 33
When admitted . . . 33
Consequences of an Agent exceeding his Authority . 34
Unauthorized Indorsement . 34
Delivery 34
Pledging 34
Bill Brokers . . . 35
When the Production of Agent's Authority may be required 35
How determined . . . 36
When it may be delegated . 36
Personal Liability of an Agent to third Persons . 36
Parol Evidence inadmissible to discharge the Agent . 37
Signature without Authority 37
Liability how avoided . 38
Liability of Agent for Fraud 38
Rights of an Agent against third Persons . . . 38
Liability of an Agent to his Principal . . . 40
Rights of Principal against third Persons . . . 40
PARTNERS 40
PARTNERSHIP, BOTH ACTUAL AND OSTENSIBLE . 41
Agreement, inter se, *not to draw Bills* . . . 41
Cases in which Partners are both entitled and liable in respect of a Bill . . 41
Rights and Liabilities as between the Firm and the World 43
One Partner binding the others by Bills . . 43
By Promissory Notes . . 44
Must observe style of Firm . 44
Farming and Mining Partnerships 45
Partnerships not in Trade . 45
Creditors carrying on a Trade 45
Consequences of Partner exceeding his Authority . 45
Where there is Notice . . 46
Common Partner in two Firms of the same Name . 48
New Partner . . . 48
Fresh Security . . . 48
DORMANT OR SECRET PARTNER 49
His Liability . . . 49
NOMINAL PARTNER . . 50
DISSOLUTION . . . 50
Retirement of Secret Partner 52
OCCASIONAL PARTNERSHIPS 53
EXECUTORS AND ADMINISTRATORS 53
Their Rights and Duties . 54
Effect of Probate . . 54
Debtor made Executor . 54
Debtor becoming Administrator 56
When Executors may sue as such 56
Delivery after Indorser's Death 57
Indorsement by one Executor of several . . . 57
Personal Liability on a Bill 57
Joinder of common Counts in Actions against . . 57
INFANTS 58

PERSONS UNDER UNDUE INFLUENCE . . . 61
LUNATICS 61
PERSONS DRUNK . . 62
MARRIED WOMEN . . 63
CONVICTED FELONS . . 67
ALIENS 67
CORPORATIONS AND BANKING COMPANIES . . 67
Bank of England . . 68
Banks of not more than six Partners 70
Banks of more than ten Partners 70
JOINT STOCK COMPANIES . 71
At Common Law . . 71
Joint Stock Companies under 7 & 8 Vict. c. 110 . . 72
Joint Stock Companies under subsequent Acts . . 72
PERSONS ACTING IN AN OFFICIAL CAPACITY . . 73
LOAN SOCIETIES . . 74

CHAPTER V.

AGENTS.

WHATEVER a man may do by himself (except in virtue of a delegated authority), he may do by his agent (*a*).

Who may be an agent.

Disqualifications for contracting on a person's own account are not disqualifications for contracting as an agent for another; for an agent is considered as a mere instrument. Therefore, infants (*b*), married women, persons attainted, outlawed, or excommunicated, aliens, and other persons labouring under disabilities, may be agents (*c*).

A special and a general agent.

Loose expressions are to be found in the books as to the distinction between a special and a general agent. But all agents are more or less general, and all are more or less special.

Actual and ostensible authority.

A more important distinction is between the *actual* and the *ostensible* authority of an agent. If the principal's representations or acts give to the agent the appearance of an authority larger than the agent actually possesses, the principal may be bound by such of the agent's acts as, although beyond the line of the agent's actual authority, are still within the margin of his ostensible or apparent authority. And this, on the established and elementary principle, that untrue representations, on the faith of which a man induces a third person to act, bind the party making them.

How an agent may be appointed.

No particular form of appointment is necessary to enable an agent to draw, accept, or indorse bills, so as to charge his principal. He may be specially appointed for this purpose

(*a*) *Combe's case*, 9 Rep. 75.

(*b*) But an infant, though he may be a private, cannot be a public attorney; that is, an attorney at law to conduct suits. Mirror, c. 2, s. 21; Co. Litt. 128 a.

(*c*) Co. Litt. 52 a.

CHAPTER V.

or may derive his power from some general or implied authority.

Subsequent recognition of an agent's acts is equivalent to previous authority; provided the agent, when he acted, assumed to act as agent (*d*).

General authorities to transact business, and to receive and discharge debts, do not confer upon an agent the power of accepting or indorsing bills, so as to charge his principal (*e*). And special authorities to accept or indorse are construed strictly. A. B., who carried on business on his own account, and also in partnership, went abroad, and gave to certain persons in this country two powers of attorney; by the first of which, authority was given for him, and in his name and to his use, to do certain specific acts (and, amongst others, to indorse bills, &c.), and generally to act for him, as he might do if he were present; and, by the second, authority was given, "for him, and on his behalf, to accept bills drawn on him by his agents or correspondents." C. D., one of A. B.'s partners (and who acted as his agent), in order to raise money for payment of the creditors of the joint concern, drew a bill which the attorney accepted in A. B.'s name by procuration. In action against A. B. by the indorsee of the bill, held, first, that the right of the indorsee depended upon the authority given to the attorney; secondly, that the power applied only to A. B.'s individual, and not to his partnership affairs; thirdly, that the special power to accept extended only to bills drawn by an agent in that capacity; and that C. D. did not draw the bills in question as agent, but as partner; and, lastly, that the general words in the power of attorney were not to be construed at large, but as giving general powers for the carrying into effect the special purposes for which they were given (*f*). An authority to

(*d*) Viner's Ab. Ratihabition; *Saunderson* v. *Griffiths*, 5 B. & C. 909; D. & R. 643; *Vere* v. *Ashby*, 10 B. & C. 288. See the law of Ratihabition discussed in *Wilson* v. *Tumman*, 6 M. & G. 236, which is the leading case on the subject. See also *Ancona* v. *Marks*, 31 L. J., Exch. 163; 7 N. & N. 686. In America it has been held that ratihabition will not relieve the agent from personal liability on a promissory note once incurrred. *Rossiter* v. *Rossiter*, 8 Wendell, 494.

(*e*) *Hogg* v. *Snaith*, 1 Taunt. 347, and *Hay* v. *Goldsmid*, there cited; *Murray* v. *East India Company*, 5 B. & Ald. 204; and see *Howard* v. *Baillie*, 2 H. Bla. 618; *Gardner* v. *Baillie*, 6 T. R. 591; *Kilgour* v. *Finlyson*, 1 H. Bla. 155; *Hay* v. *Goldsmid*, 2 Smith's Rep. 79; *Esdaile* v. *Lanauze*, 1 Y. & Col. 394. But where an agent managed a business and acted ostensibly as principal, it was held that he could bind his principal by accepting a bill, even though expressly forbidden so to do. *Edmunds* v. *Bushell*, L. R., 1 Q. B. 97; 35 L. J. 21.

(*f*) *Attwood* v. *Munnings*, 7 B. & C. 278; 1 M. & R. 78.

indorse bills remitted to the principal, gives no power to indorse a bill which the principal could not have indorsed without a fraud, although the bill get into the hands of a *bonâ fide* holder for value without notice (*g*). It would have been otherwise had the principal himself indorsed (*h*).

Procuration.

The words "*per procuration*" are an express intimation of a special and limited authority. And a person who takes a bill so drawn, accepted or indorsed, is bound to inquire into the extent of the authority (*i*).

When authority may be inferred.

An authority is often implied from circumstances; as if the agent has formerly been in the habit of drawing, accepting or indorsing for his principal, and his principal has recognized his acts. Thus, to an action against an acceptor of a bill, the defence was, that the drawer had forged the acceptor's signature, in answer to which it was proved that the defendant had previously paid such acceptances; and this was held proof of authority to the drawer (*k*).

To indorse.

"It may be admitted," says Tindal, C. J., "that an authority to draw does not import in itself an authority to indorse bills; but still the evidence of such authority to draw is not to be withheld from the jury, where they are to determine on the whole of the evidence, whether an authority to indorse existed or not" (*l*). And therefore, from the facts that the defendant's confidential clerk had been accustomed to draw checks for them, that *in one instance* they had authorized him to indorse, and in two other instances had received money obtained by his indorsing in their name, a jury was held warranted in inferring that the clerk had a general authority to indorse (*m*).

When admitted.

The acceptance of a bill drawn by procuration is an admission of the agent's authority *to draw*, but no admission of

See *Bank of Bengal* v. *M'Cleod*, 7 Moore, P. C. C. 35.

(*g*) *Fearn* v. *Filica*, 14 L. J., C. P. 15; 7 M. & G. 513, S. C.

(*h*) Ibid.

(*i*) *Alexander* v. *M'Kenzie*, 6 C. B. 766; 18 L. J., C. P. 94, S. C.; *Attwood* v. *Munnings*, 7 B. & C. 278; Bayley on Bills, 6 Ed. 82; Smith's Mercantile Law, 5 Ed. 134; *Stagg* v. *Elliott*, 31 L. J., 260, C. P.; 12 C. B., N. S. 373, S. C. But the Court of Exchequer seem to have adopted a different rule in the case of a charter-party signed P. P.

(*k*) *Barber* v. *Gingell*, 3 Esp. 60; *Llewellyn* v. *Winckworth*, 13 M. & W. 598; *Cash* v. *Taylor*, Lloyd and Welsby's Mercantile Cases, 178; 8 L. J., K. B. 262.

(*l*) *Prescott* v. *Flinn*, 9 Bing. 19; 2 Moo. & Sc. 22, S. C.

(*m*) Ibid.

CHAPTER V.

his authority to indorse, though the indorsement were on the bill at the time of acceptance (*n*).

Consequences of an agent exceeding his authority.

An agent who exceeds his authority, in negotiating a bill, cannot convey a title to it, if overdue at the time; and a party, who takes a bill from an agent under such circumstances that his title is affected by the wrongful act of the agent, is liable to refund, to the principal, money which he may receive in discharge of the bill from the previous parties; or, if in lieu of money he take a substituted bill, such second bill belongs to the principal, and the principal may countermand payment. For neither in the first bill, or in the fruit of it, the second bill, or in money received on either, has he any greater interest than his indorser could convey, *viz.* the interest of an agent, and a principal has a right to countermand payment to his agent (*o*).

Unauthorized indorsement.

If an agent indorse, without authority, a bill payable only to order, such indorsement conveys no right of action, except against the party indorsing (*p*).

Delivery.

But the unauthorized delivery of bills or notes payable to bearer, gives a *bonâ fide* holder a claim on the other parties (*q*).

But in any case, if the transferee know that the transferor has no right to pass the bills, he can acquire no property in them. Thus, where the plaintiff indorsed bills to A. B. specially in this form, "Pay A. B. or order, for account of plaintiffs," and A. B. pledged the bills with defendant for his private debt, it was held that the defendant took them with sufficient notice that they did not belong to A. B., and that defendant was liable to plaintiffs in an action of trover (*r*).

Pledging.

An agent, who receives a bill for the purpose of getting it discounted, has no right to pawn it for a sum smaller than the amount of the bill, minus the discount, for his

(*n*) *Robinson* v. *Yarrow*, 7 Taunt. 455; 1 Moo. 150. See the Chapter on ACCEPTANCE.

(*o*) *Lee* v. *Zagury*, 8 Taunt. 114; 1 Moo. 556.

(*p*) See *Fearn* v. *Filica*, 7 M. & G. 513; 14 L. J., C. P. 15, S. C.

(*q*) Bayley, 106; *Miller* v. *Race*, 1 Burr. 452; *Lawson* v. *Weston*, 4 Esp. 56; *Raphael* v. *Bank of England*, 17 C. B. 161. See Chap. XI. on TRANSFER.

(*r*) *Treuttell* v. *Barandon*, 8 Taunt. 100; 1 Moo. 543, S. C. See the subject of restrictive indorsements more fully treated in the Chapter on TRANSFER.

employer may, by the pawnee's detention of the bill, or by his change of residence, or by its further negotiation, be prevented from raising on the bill its full value, and yet be exposed to pay its full amount to a subsequent *bonâ fide* holder.

Bill brokers.

An agent or bill broker, intrusted to discount, has no right to pledge the bill as a security for money previously due from himself (*s*). And it is very doubtful whether an usage entitling him to do so would be legal (*t*). *Primâ facie*, a bill broker has no right to pledge the bills of his different customers in one mass, for that might subject a bill to a lien beyond the amount advanced upon it (*s*). But the usage of a particular district may enlarge the authority of a bill broker, and give him a right to pledge the bills of different customers in one mass (*t*). Such is the usage of bill brokers in the city of London, and it is not an unreasonable one, for although it may occasionally be attended with inconvenience, yet, on the other hand, the bill broker may often raise money on a large scale on better terms than on a small one, or discount, with other bills, bills which alone could not be discounted at all (*u*).

When the production of an agent's authority may be required.

If an offer to accept be made by an agent, the holder may and should require the production of his authority, and, if satisfactory authority be not produced, may treat the bill as dishonoured. "A person taking an acceptance importing to be by procuration," says Mr. Justice Bayley, "ought to exercise due caution, for he must take it upon the credit of the party who assumes the authority to accept, and it would be only reasonable prudence to require the production of that authority" (*x*). It has been doubted whether, in any case, a holder is bound to acquiesce in an acceptance by an agent, on the same principle that it has been held that a purchaser is not bound to accept a conveyance to be executed by a power of attorney, *viz.*: that it will multiply the proofs necessary to sustain his title (*y*).

(*s*) *Haynes* v. *Foster*, 2 C. & M. 237.

(*t*) *Foster* v. *Pearson*, 1 C., M. & R. 849; 5 Tyr. 255, S. C.

(*u*) "A bill broker is not a person known to the law with certain prescribed duties, but his employment is one which depends entirely on the course of dealing." Ibid. *Foster* v. *Pearson*, 1 C., M. & R. 849.

(*x*) *Attwood* v. *Munnings*, 7 B. & C. 278; 1 M. & R. 78.

(*y*) See *Coore* v. *Callaway*, 1 Esp. 115; Chitty, 283.

CHAPTER V.

How determined.

The authority of an agent will be presumed to continue till due notice of its revocation has been given; and such notice should be, as to strangers, by publication in the *Gazette;* and, as to customers and correspondents, by express individual communication (*b*).

Delegated.

A mere agent cannot delegate his authority, unless specially authorized so to do (*c*).

Effect of notice to an agent.

The effect of notice to an agent of an infirmity in the title to a bill of exchange which he receives for his principal will be discussed in the Chapter on CONSIDERATION.

Personal liability of an agent to third persons.

An agent will be personally liable to third persons on his drawing, indorsing or accepting, unless he either sign his principal's name only, or expressly state in writing his ministerial character, and that he signs only in that character; "unless," to use the words of Lord Ellenborough (*d*), "he states upon the face of the bill that he subscribes it for another; unless he says plainly, 'I am the mere scribe.'"

Thus, where the defendant, agent of a banker, drew the following bill: "Pay to the order of A. B. 50*l*., value received, which place to the account of the Durham Bank, as advised," and subscribed his own name, it was held that the defendant was personally answerable and he alone, though the plaintiff, the payee, knew that he was only agent (*e*). So, if a broker draws upon the buyer of goods which he has sold for his principal in favour of the latter, to whom he indorses the bill, he is liable, as drawer, to his principal (*f*). A bill for 200*l*. was drawn upon the defendant by the description of "Mr. H. Bishop, *Cashier of the York Buildings Company, at their house in Winchester Street, London;*" and the bill directed him to place the 200*l*. to the account of the company. The letter of advice from the drawer of the bill was sent to the company, and by their direction the defendant accepted it, in this form, "Accepted, 13th June, 1732, per H. Bishop." He was held responsible, the Court considering the addition to his name as merely descriptive,

(*b*) See *Newsome* v. *Coles*, 2 Camp. 617.

(*c*) *Combe's case*, 9 Rep. 75; *Palliser* v. *Ord*, Bunb. 166. But an authority to indorse may imply an authority to indorse by the hand of another in the agent's presence. *Lord* v. *Hall*, 9 L. J., C. P. 147; 8 C. B. 627, S. C.; see also *Ex parte Sutton*, 2 Cox, 84.

(*d*) *Leadbitter* v. *Farrow*, 5 M. & S. 345; *Sowerby* v. *Butcher*, 2 C. & M. 368; 4 Tyr. 320, S. C.; *Alexander* v. *Sizer*, L. R., 4 Ex. 105; 37 L. J. 59, S. C.

(*e*) Ibid.; *Goupy* v. *Harden*, 7 Taunt. 160; 2 Marsh. 454.

(*f*) *Lefevre* v. *Lloyd*, 5 Taunt. 749; 1 Marsh. 318.

the order to place the sum to the account of the company as a direction how to reimburse himself, and the letter of advice inadmissible to superadd to the terms of the bill, as against the plaintiff, an indorsee (*g*). And a bill directed to W. C. for value received in machinery supplied to the adventurers in Hayter and Holme Moor Mines, and accepted as follows: "Accepted for the companies, payable at the Union Bank, &c., W. C., Purser," was held to create a personal liability (*h*).

Inadmissibility of parol evidence to discharge him.

The rule of law as to simple contracts in writing, other than bills and notes, is, that parol evidence is admissible to charge unnamed principals, and so it is to give them the benefit of the contract (*i*); but it is inadmissible for the purpose of *discharging* the agent, who signs as if he were principal in his own name (*j*). And the rule of law is reasonable, for in the two former cases the evidence is consistent with the instrument, for it admits the agent to be entitled or bound; but in the latter case such evidence would be inconsistent with the terms of the instrument (*k*).

No one liable on a bill unless his name appears.

Yet it is conceived that the law as to negotiable instruments is different in one respect, to wit, that where the principal's name does not appear, he is not liable on a bill or note as a party to the instrument (*l*).

(*g*) *Thomas* v. *Bishop*, 2 Stra. 955; *Rew* v. *Pettet*, 1 A. & E. 196; 3 Nev. & M. 456, S. C., nom. *Crew* v. *Pettet, ante*. As to an agent's remedy, see *Huntley* v. *Sanderson*, 3 Tyr. 469; 1 C. & M. 467, S. C.

(*h*) *Mare* v. *Charles*, 25 L. J., Q. B. 119; 5 E. & B. 978, S. C. See *post*, as to officers of a public company signing in their own name.

(*i*) As to the cases in which a man who signs himself agent may come forward and sue as principal, see *Bickerton* v. *Burrell*, 6 M. & S. 383, and *Rayner* v. *Grote*, 16 L. J., Exch. 82; 15 M. & W. 359, S. C.

(*j*) As to cases in which an agent has been held personally liable at law, but not in equity, where he described himself as agent, see further *Wake* v. *Harrop*, 30 L. J., Exch. 273; *Price* v. *Taylor*, 5 H. & N. 540. And for his right to make himself so liable instead of his principal, see *Cropper* v. *Cook*, L. R., 3 C. P. 194, where a local custom to that effect was held good and equivalent to authority.

(*k*) *Higgins* v. *Senior*, 8 M. & W. 834.

(*l*) See an American case, Story on Agency, 125, n. See also *Pentz* v. *Stanton*, 10 Wend. 271; *Conro* v. *Port Henry Iron Company*, 12 Barb. 551; and the observations of Lord Ellenborough and Mr. J. Holroyd, in *Leadbitter* v. *Farrow*, 5 M. & S. 349; *Bult* v. *Morrell*, 12 A. & E. 750. But see *Lindus* v. *Bradwell*, 5 C. B. 583, where a bill drawn on the principal, accepted by the agent (the wife) in the agent's name, was held binding on the principal as acceptor. See also *Gurney* v. *Evans*, 27 L. J., Exch. 166; 3 H. & N. 122, S. C.; *Edmunds* v. *Bushell*, 35 L. J., Q. B. 91.

CHAPTER V.

Where an agent signs without authority.

An agent who makes a contract as agent thereby impliedly undertakes that he has authority, and he and his executors are liable in an action ex contractu, if he really had no authority (*m*).

Therefore, if an agent, having no authority so to do, write, without a fraudulent intent, another man's name as acceptor of a bill, that is a fraud in law for which such agent is responsible, even to a subsequent indorsee (*n*); but no one can be liable *as acceptor* but the real drawee, unless he be acceptor for honour. And where a man assuming to act as agent is really not so, in consequence of a revocation, by the death of his principal, unknown to the agent, so that there is no fault in the agent, the agent is not liable (*o*), nor the executors of the deceased principal (*p*)

An agent who has received for his principal money which the principal is bound to refund, is not liable to the owner of the money after he has paid it over to his principal in due course and without notice (*q*).

How avoided in indorsements.

A safe and proper mode in which an agent may indorse, so as to avoid personal responsibility, is by adding the words, *sans recours* or *without recourse to me* (*r*).

Liability of an agent for fraud.

An agent or servant who joins with his principal or master in the commission of a fraud, is liable to an action. Even although the principal be an incorporated company. Thus a director, manager or assistant manager of a joint-stock bank may be personally responsible for a fraudulent report. For the relation of agency or service cannot oblige to the commission of a fraud (*s*).

Rights of an agent against third persons.

If a man hold a bill or note as agent for another, and the circumstances be such that the principal cannot recover, the infirmity of the principal's title infects the agent's title, and the agent cannot recover. M. and Co., residing at Mid-

(*m*) *Lewis* v. *Nicholson*, 18 Q. B. 509; *Randall* v. *Trimen*, 18 C. B. 786; *Collen* v. *Wright*, 7 E. & B. 301; 26 L. J., Q. B. 147; 8 E. & B. 647; 27 L. J., Q. B. 215, S. C.; *Kelner* v. *Baxter*, 36 L. J., C. P. 94; 2 L. R. 174; *Scott* v. *Lord Ebury*, 36 L. J., C. P. 151; 2 L. R. 255.

(*n*) *Polhill* v. *Walter*, 3 B. & Ad. 114. If he had signed the *drawer's* name without authority, *quære*, whether he would not have been personally liable *on the bill as drawer*. *Wilson* v. *Barthrop*, 2 M. & W. 863.

(*o*) *Smout* v. *Ilberry*, 10 M. & W. 1.

(*p*) *Blades* v. *Free*, 9 B. & C. 167.

(*q*) *Holland* v. *Russell*, 32 L. J., Ex. Ch. 297.

(*r*) *Vide post*, Chapter XI.

(*s*) *Cullen* v. *Thompson*, Dom. Proc. 1863.

dleburgh, remitted to the plaintiff, in London, a Bank of England note for 500*l.* informing him that they should draw upon him for the amount at some future period. The plaintiff presented it for payment, but the Bank detained it on the ground that it had been obtained by means of a forged draft from a previous holder. In trover by the plaintiff it was held, that the plaintiff was identified with his principals, and that, as there was no evidence of their having given full value for it, he could not recover (*t*). So where O. and Co., in Paris, being indebted to the plaintiff in London, to the amount of 1,300*l.* remitted to him a Bank of England note for 500*l.*, and the Bank detained it because it had been stolen some time before, it was held in trover by the plaintiff against the Bank, that though the plaintiff had a demand on O. and Co. for more than the amount of the note at the time when he received it, yet, as no farther advances had been made or credit given by him on account of the note, he must be considered as their agent, and prove that his principals, O. and Co., gave full value for it (*u*). From this case, it might seem to follow, as a general rule, that wherever a bill or note, payable on demand, is remitted to a creditor in liquidation of an existing debt only, and no fresh credit is given or advances made by the creditor on the faith of the instrument, he may be treated by the parties liable on it as the agent of the debtor from whom he received it. A doctrine which, while it cannot injure the creditor (for if he cannot recover, still he is but where he was before he received the remittance) would, no doubt, tend to prevent gratuitous, fraudulent, or felonious holders of paper from obtaining its value by paying it away to their creditors (*x*). But it is conceived that in general a pre-existing debt due to the transferee of a bill entitles him to all the rights of a holder for value (*y*).

(*t*) *Solomons* v. *The Bank of England*, 13 East, 135; 1 Rose, 99, S. C.

(*u*) *De la Chaumette* v. *The Bank of England*, 9 B. & C. 208.

(*x*) This doctrine was much discussed in the case of *Kinnersley* v. *Somers*, Exch. M. T. 1832, in relation to Serjeant Onslow's Act, 58 Geo. 3, c. 93. The Court appeared inclined to support the rule deducible from *De la Chaumette* v. *Bank of England*, but no judgment was given, and the cause was, I believe, afterwards settled. But see *Percival* v. *Framplin*, 3 Dow, 752; *Foster* v. *Pearson*, 1 C., M. & R. 849; 5 Tyr. 255, S. C. It is to be recollected that a bill or note, payable at a future day, suspends till its maturity the remedy for the antecedent debt. There may, therefore, in this respect be a difference between an instrument payable on demand, and one payable at a future day. See the Chapter on CONSIDERATION.

(*y*) It has been solemnly so held by the Supreme Court of the United States, *Swift* v. *Tyson*, 16 Peters, 97. See the Chapter on CONSIDERATION.

CHAPTER V.

Liability of agent to his principal.

An agent who fraudulently negotiates or deposits bills is guilty of a misdemeanor, under the 24 & 25 Vict. c. 95, ss. 75 and 76, and is punishable with seven years' penal servitude.

If an agent, employed to present a bill, fails to make a due presentment, or to give due notice of dishonour, he is liable to an action at the suit of his principal (*z*), who may recover nominal damages, though he have sustained no actual loss.

Rights of principal against third persons.

As a principal is bound by his agent's contracts, so he may take advantage of them, but he is, if undisclosed at the time of the contract, subject to any defence, partial or complete, on which the defendant could have relied against the agent. A drawer delivered a bill to his agent to be discounted, the agent indorsed the bill as his own to the defendant, a bill broker, who procured it to be discounted but handed over to the agent only a portion of the proceeds. The drawer, being afterwards obliged to take up the bill, sued the defendant for money had and received to the drawer's use. It was held, that he was entitled to recover, and that a representation by the agent, that the bill was his own, would not preclude the principal from recovering, but only subject him to any defence which the defendant might have set up against the agent (*a*).

An agent who has authority to take cash in payment has thereby no authority to take bills (*b*).

PARTNERS.

A partnership is where several persons are jointly engaged in a common undertaking with a communion of profit and loss (*c*).

But, to render a man liable to third persons as a partner, it is sufficient if he merely hold himself out to *them* as such, though he really have no interest whatever; or if he really have an interest, though his name do not appear (*d*).

(*z*) *Van Wart* v. *Woolley*, R. & Moo. 4; 3 B. & C. 439; 5 D. & R. 374; 1 M. & M. 520, S. C.

(*a*) *Bastable* v. *Pool*, 1 C., M. & R. 410; 5 Tyr. 111, S. C.

(*b*) *Sykes* v. *Gyles*, 5 M. & W. 645; *Williams* v. *Evans*, 35 L. J., Q. B. 11; 1 L. R. 352. *Post*, Chapter XXIX.

(*c*) But a communion of *loss* is not essential to the existence of a partnership. "Sed nec damni communio ad substantiam societatis pertinet; quippe quæ etiam ita constitui potest, ut unus e sociis damni sit expers." Vin. Com. 3—26. *Gilpin* v. *Enderby*, 5 B. & Ald. 954; 1 D. & R. 570, S C.; *Bond* v. *Pittard*, 3 M. & W. 357; *Fereday* v. *Hordern*, Jac. 144; 18 Ves. 306; Smith's Commercial Law, 3rd ed. 21.

(*d*) *Pott* v. *Eyton*, 3 C. B. 32. And see *post* as to occasional partnerships.

CHAPTER V.

Division of the subject.

In treating of partnership, in its relation to bills of exchange, we shall consider, first, the case of a partnership which is both actual and ostensible; secondly, the case of a secret or dormant partner; thirdly, the case of a mere nominal or ostensible partner; fourthly, the consequences of a dissolution; and lastly, the case of an occasional partnership.

PARTNERSHIP BOTH ACTUAL AND OSTENSIBLE.

First, as to a partnership both actual and ostensible.

And herein, first, with respect to the rights and liabilities of such partners *inter se*.

Agreement *inter se* not to draw bills.

In many deeds and agreements of partnership there is a stipulation, that one partner shall not draw, indorse or accept bills without the consent of his co-partner; the consequence of a violation of this stipulation is, *as between the partners*, to create a right of action at the suit of the injured partner against the partner violating it, and, as we shall presently see, to protect the former against bills improperly drawn, indorsed or accepted, and in the hands of a holder *with notice*.

Cases in which partners and others are both entitled and liable in respect of a bill.

Where a plaintiff is interested in a bill or note as plaintiff, and yet jointly liable with the defendant, though the objection do not appear on the face of the declaration, he cannot sue on it. Thus, where M. sued on a note, and the defendants pleaded that the note was made by M., the plaintiff, and others jointly with the defendant, the plea was held a good plea in bar (*e*). So, where a note was made by E. in favour of the firm in which he was a member, *viz.*, C., D. and E., and by them indorsed to A., B. and C., who, as indorsees, brought an action against D., and D. pleaded (not in abatement but in bar) that C., one of the plaintiffs, was also liable as an indorser, together with D., the defendant, the plea was held good (*f*). So where the plaintiff, the holder of shares in a washing company, drew bills on the directors of the company for goods furnished by him, which bills were accepted for the directors by their secretary, in an action by the plaintiff against the directors, it was held that he could not recover. "It may be admitted," says Best, C. J., "that if a partner were to draw on other partners by name, and they were individually to accept, he might recover against them, because by such an acceptance a separate right is acknowledged to exist. But that is not the case here, for the bills are drawn on the directors of the company and

(*e*) *Moffat* v. *Van Millingen*, 2 B. & P. 124, n.

(*f*) *Mainwaring* v. *Newman*, 2 B. & P. 120.

CHAPTER V.

accepted for the directors. They are the agents of the company, and accept as agents of the company. The case, therefore, is that of one partner drawing on the whole firm, including himself" (*g*). An agent, and member of a company, employed to sell goods for the company, drew in his own name, and payable to his own order, a bill on a purchaser of the goods; he then indorsed it to the actuary of the company, who indorsed it to another member and creditor of the company. It was held that the last indorsee could not sue the drawer on the bill. "Both the defendants," say the Court, "were members of the company. If, therefore, the plaintiffs could recover on this bill, it would be a recovery by one joint contractor against another, and then the defendants would have a right to call on the plaintiffs for contribution. It is clear, therefore, that no action can be maintained upon the bill" (*h*). But where a married woman, being administratrix, received a sum of money in that character, and lending the same to her husband took for it the joint and several promissory notes of her husband and two other persons, it was held that, after her husband's death, she might maintain an action against the surviving makers (*i*). And where a joint and *several* note was given to two payees, one of them being also one of the makers, it was held that an action lay at the suit of the two payees against the other maker (*k*) So, where the holder of a bill is also liable upon it, the technical difficulty in the way of an action may be removed by indorsement before the bill is due (*l*).

From these cases the following general principles appear to result.

That in no case can a man sue, where on the face of the record he is both plaintiff and defendant.

Nor where he is, on the contract declared on, both entitled and liable on the face of the instrument (*m*), though that

(*g*) *Neale* v. *Turton*, 4 Bing. 149; 12 Moore, 365, S. C.

(*h*) *Teague* v. *Hubbard*, 8 B. & C. 345; 2 M. & R. 369; Dans. & Ll. 118, S. C. But the mere holding of scrip only constitutes such an inchoate right of partnership as will not interfere with an action on a note given by the directors. *Fox* v. *Frith*, 10 M. & W. 131.

(*i*) *Richards* v. *Richards*, 2 B. & Ad. 447; see *Rose* v. *Poulton*, 2 B. & Ad. 822.

(*k*) *Beecham* v. *Smith*, E., B. & E. 442.

(*l*) *Morley* v. *Culverwell*, 7 M. & W. 174; *Steele* v. *Harmer*, 15 L. J., Exch. 219; 14 M. & W. 831, and 19 L. J., Exch. 34; 4 Exch. 1, S. C., in error.

(*m*) In the case of a joint and several note, see *Beecham* v. *Smith*, *supra*. Where payee's name accidentally appeared on bill as drawer, a demurrer was overruled in Equity; *Druitt* v. *Lord Parker*, 37 L. J., Chan. 241.

do not appear on the declaration, and though the defendant omit to plead the non-joinder in abatement.

Nor in certain cases where he is both entitled and liable to contribute, though such liability appear neither on the instrument nor on the record (*n*). But the giving of a bill or note may be an acknowledgment of a separate right and corresponding obligations (*o*).

That the mere technical difficulty, of the same person being both entitled and liable on the face of the instrument, may be removed by death, survivorship, or transfer, provided there be no liability to contribute.

As between the firm and the world.

Secondly as to the rights and liabilities of partners, both actual and ostensible, as between the firm and the world, in respect of bills and notes.

One partner in trade binds the other.

The law presumes, that each partner in trade is intrusted by his co-partners with a general authority in all partnership affairs.

Each partner, therefore, by making, drawing, indorsing or accepting negotiable instruments (*p*), *in the name of the firm*, and in the course of the partnership transactions, binds (*q*), the firm, whether he sign the name of the firm, or sign by procuration, or *accept* in his own name, a bill drawn on the firm (*r*). But it is a strict rule that the name of the firm must be used, otherwise an action cannot be maintained against the firm even where a partner has signed his own name only, and the proceeds were in reality applied to partnership purposes (*s*), unless the name of the signing partner were also the name of the firm (*t*); in which case

(*n*) But see as to Joint Stock Companies, 7 & 8 Vict. c. 110, s. 45; 20 Vict. c. 47; 21 Vict. c. 14; 21 Vict. c. 80; 22 Vict. c. 60.

(*o*) See the observations of Best, C. J., in *Neale* v. *Turton*, 4 Bing. 149; 12 Moore, 365, S. C.; see also *Bedford* v. *Brutton*, 1 Bing. N. C. 399; *Andrews* v. *Ellison*, 6 B. Moore, 199; *Lomas* v. *Bradshaw*, 19 L. J., C. B. 273; 9 C. B. 620, S. C.

(*p*) *Harrison* v. *Jackson*, 7 T. R. 207; *Pinkney* v. *Hall*, 1 Salk. 126; 1 Ld. Raym. 175, S. C.; *Lane* v. *Williams*, 2 Vern. 277; *Wells* v. *Masterman*, 2 Esp. 731; *Swan* v. *Steele*, 7 East, 210; 3 Smith, 199, S. C.; *Ridley* v. *Taylor*, 13 East, 175.

(*q*) As to bills given for money borrowed for partnership purposes, see *Browne* v. *Kidger*, 28 L. J., Exch. 66; 3 H. & N. 853, S. C.

(*r*) *Mason* v. *Rumsey*, 1 Camp. 384; see *Jenkins* v. *Morris*, 16 M. & W. 879; *Stephens* v. *Reynolds*, 5 H. & N. 513.

(*s*) *Siffkin* v. *Walker*, 2 Camp. 308; *Ex parte Emly*, 1 Rose, 61; *Emly* v. *Lye*, 15 East, 7; *Nicholson* v. *Ricketts*, 29 L. J., Q. B. 55.

(*t*) *South Carolina Bank* v. *Case*, 8 B. & C. 427; 2 Man. & Ry. 459, S. C.; *Smith* v. *Craven*,

CHAPTER V.

it was formerly held that the holder might charge either the signing partner or the firm, at his election (*u*). Where one of the partners indorsed the name of the firm on fictitious bills, the firm was held liable (*v*).

Not by joint and several promissory note.

A partner cannot bind his co-partner by the several obligation of a joint and *several* note (*w*), but such a note would not be void as a joint note (*x*), for it seems a partner may bind his co-partner by a joint note (*y*) for partnership purposes, even though in violation of partnership articles, provided the note be in the hands of a holder for value without notice (*z*).

Not varying the style of the firm.

The firm is not liable where the signing partner varies the style of the firm, unless there be some evidence of assent by the firm to the variation, or unless the name used, though inaccurately, yet substantially describe the firm (*a*). Therefore, where a firm consisted of John Blurton and Charles Habershon, who carried on business under the firm of John Blurton, it was held that the firm was not bound by an *indorsement*, by one partner who had written John Blurton and Co. (*b*). And where defendants never traded under the firm of Dry and Co., but only under the firm of Dry and Everett, it was held that defendant Everett was not bound by a bill accepted by Dry, not for partnership purposes, in the name of Dry and Co. (*c*).

But if a bill be drawn on a firm, and *accepted* by one

1 C. & J. 507; *Nicholson* v. *Ricketts*, 29 L. J., Q. B. 55; and see *Ex parte Bolitho*, 1 Buck. 100; *Swan* v. *Steele*, 7 East, 210; 3 Smith, 192, S. C.; and see *post*.

(*u*) *Hall* v. *Smith*, 1 B. & C. 407; 2 D. & R. 484; *Clerk* v. *Blackstock*, Holt, 474; *March* v. *Ward*, Peake, 130; *Wilks* v. *Back*, 2 East, 142; but see now *Ex parte Buckley*, *In re Clarke*, 14 M. & W. 469; 15 L. J., Bktcy. 3, S. C.

(*v*) *Thicknesse* v. *Bromilow*, 2 C. & J. 425.

(*w*) *Perring* v. *Hone*, 4 Bing. 28; 12 Moore, 125; 2 C. & P. 401, S. C.

(*x*) *M'Clae* v. *Sutherland*, 3 E. & B. 36.

(*y*) *Cross* v. *Cheshire*, 21 L. J., Exch. 3.

(*z*) See the numerous American authorities on this subject, Byles on Bills, 5th American edition, p. 126.

(*a*) *Williamson* v. *Johnson*, 1 B. & C. 146; 2 D. & R. 281; *Faith* v. *Richmond*, 11 A. & E. 339; 3 Per. & D. 187, S. C.; *Forbes* v. *Marshall*, 11 Exch. 166; *Stephens* v. *Reynolds*, 29 L. J., Exch. 278; 5 H. & N. 513, S. C.

(*b*) *Kirk* v. *Blurton*, 9 M. & W. 284; but see *M'Clae* v. *Sutherland*, 3 E. & B. 36.

(*c*) *Sheppard* v. *Dry*, Norwich, 1840, cor. Parke, B., affirmed in Q. B. *Quære*, whether a partner may not bind his co-partner by signing the true names of the partners, though such names be not the style of the firm. *Norton* v. *Seymour*, 3 C. B. 792; *M'Clae* v. *Sutherland*, *supra*.

partner in his own name for partnership purposes, that acceptance will bind the firm (*d*).

Farming and mining partnerships.

It has been held, that as the drawing or accepting of bills is not in general necessary in a farming or mining concern, bills accepted by one of the partners in such a concern without express authority, do not bind the firm (*e*).

Partnerships not in trade.

And partners not in trade cannot bind each other by bills. Therefore one attorney, who is partner with another, has not from that relation alone power to bind his co-partner by a bill or note (*f*). No more have partners carrying on business as brokers by getting orders on commission and dividing the expenses (*g*).

Creditors carrying on business under a deed of arrangement.

Creditors who are empowered by a deed of arrangement, made between themselves and their debtor, to carry on the trade to satisfy their debts *out of the profits*, and to pay over the residue to the debtor, are not partners at all, and therefore are not liable on bills accepted by them in the style of their debtor's firm (*h*). For a creditor, who stipulates that he will be paid out of the profits only, gains nothing beyond what he already had as a creditor: on the contrary, he only abandons some other sources from which he might have obtained satisfaction. As a creditor, he could have satisfied himself out of the whole property of his debtor including profits.

Consequences of partner exceeding his common law authority.

Even if a partner exceed the authority conferred by the common law and pledge the partnership credit on a negotiable

(*d*) *Mason* v. *Rumsey*, 1 Camp. 384.

(*e*) *Greenslade* v. *Dower*, 7 B. & C. 635; 1 M. & R. 640, S. C.; *Dickinson* v. *Valpy*, 10 B. & C. 128; 5 M. & R. 126; *Russell* v. *Pollett*, executors, 1840. But see *Brown* v. *Kidger*, 3 H. & N. 853. Unless it be the ordinary and known course of such mining concerns as the defendant's to draw and accept bills.

(*f*) *Hedley* v. *Bainbridge*, 3 Q. B. 316; *Forster* v. *Mackworth*, L. R., 2 Ex. 163; 36 L. J. 94, which was the case of a post-dated check. In America it has been held that the same rule applies to partners in the practice of physic, and to partners in a tavern. See the authorities, Byles on Bills, 5th American edition, p. 126.

(*g*) *Yates* v. *Dalton*, 28 L. J., Exch. 69.

(*h*) *Cox* v. *Hickman*, 8 House of Lords Cases, 268; 9 C. B., N. S. 47; 30 L. J., C. P. 125, S. C. This case has been supposed to shake the authority of *Waugh* v. *Carver*. See *Bullen* v. *Sharpe*, ~~Exch. Ch., M. T., 1866~~. The law as to the effect of a participation of profits in constituting a partnership is now partially altered by stat. 28 & 29 Vict. c. 86.

CHAPTER V.

security for his own private advantage, his co-partners are liable to a holder for value without notice.

And if there be a good defence against one of several partners or co-plaintiffs suing on a bill, note or other joint contract, it is a good defence against all (*i*). Although the co-partner or co-plaintiff to whose right to sue the objection applies have been guilty of a fraud on his co-partners and companions, and they have been innocent of it. "Are they not bound by his acts," says Lord Ellenborough "when they are to recover by his strength" (*j*). The defrauded partner's remedy (at least during his companion's lifetime) must be in equity (*k*). Thus if one partner assume to relieve an acceptor of his responsibility, the firm lose their action. Two bills had been drawn by a partnership, and accepted, and it was proved that the value received for the acceptance had been employed in taking up other acceptances for the accommodation of the partnership; the promise of one partner, in fraud of his co-partners, to provide for the acceptances, was held to be a sufficient defence to an action by them against the acceptor (*l*).

So, where D. drew a bill in his own name, and gave the acceptor a memorandum, in writing, that he would provide for it when due, having indorsed it to the firm of A., B., C. and D., it was held that the firm were bound by his acts, and could not recover against the acceptor (*m*).

Where there is notice.

But, if the party taking a bill or note of the firm knew, at the time, that it was given without the consent of the other partners, *he* cannot charge them (*n*). And the taking a joint security for a separate debt raises a presumption that the creditor who took it knew that it was given without the concurrence of the other partners (*o*). If there existed fraud

(*i*) *Astley* v. *Johnson*, 5 H. & N. 137; *Brandon* v. *Scott*, 7 E. & B. 234.

(*j*) *Richmond* v. *Heapy*, 1 Stark. 204.

(*k*) See *Jones* v. *Yates*, 9 B. & C. 539; *Gordon* v. *Ellis*, 7 M. & G. 607; 2 C. B. 821.

(*l*) *Richmond* v. *Heapy*, 1 Stark. 202.

(*m*) *Sparrow* v. *Chisman*, 9 B. & C. 241; 4 M. & R. 206.

(*n*) "The doctrine of the text," says Mr. Sharswood, "is sustained by the whole current of the American authorities." See them digested in the 5th American edition of Byles on Bills, by the Hon. George Sharswood, p. 129. See, too, case of *Darlington Bank*, 34 L. J., Chan. 10.

(*o*) *Richmond* v. *Heapy*, 1 Stark. 202; *Arden* v. *Sharpe*, 2 Esp. 524; *Barber* v. *Backhouse*, Peake, 61; and see *Wallace* v. *Kelsall*, 7 M. & W. 264; *Jones* v. *Yates*, 9 B. & C. 532; *Jacaud* v. *French*, 12 East, 317; *Gordon* v. *Ellis*, 7 M. & G. 607; *Lawson* v. *Lane*, M. T. 1862; 32 L. J., N. S. 82, C. P.; 18 C. B., N. S. 278, established this view of the law.

and collusion between the partner and his creditor, the bill is void in the hands of the fraudulent holder, not only against the partnership, but against other parties to the bill (*p*). But securities which may be unavailing against the firm, when in the hands of the party privy to the transaction, will nevertheless bind them when in the hands of an innocent indorsee for value (*q*). But in such a case it lies on the plaintiff to shew that he gave value (*r*).

Effect of partnership articles against drawing bills.

Articles of agreement between the partners, that no one partner shall draw, accept or negotiate bills of exchange, will not protect the firm against bills drawn, accepted, or indorsed, in violation of the agreement, if the holder had, at the time of taking the bill (*s*), no notice of the stipulation, and can shew that he gave value. But if notice of such agreement can be brought home to the holder, or if, in the absence of such agreement between the partners, the other partners have given him notice that they will not be responsible for bills circulated by their co-partner, the firm cannot be charged, though the bill was given in the course of partnership transactions (*t*).

Pleading and evidence.

The proper mode of raising the defence of unauthorized and fraudulent acceptance by one of several partners and notice to the plaintiff, is by a traverse of the acceptance (*u*).

If the defendants shew that the bill was circulated in violation of partnership articles, they will thereby put the plaintiff to prove that he or some one under whom he claims gave value for it (*v*). But it has been held by the Court of Queen's Bench, after conference with the Judges of the other Courts, that in order to maintain the action, where it appears that one partner has accepted in fraud of his co-partners, and *where issue is taken on the acceptance*, it is

But when the bill is in the hands of a transferee for value, the *onus* of proof may be shifted. In a recent case where the acceptance of the firm was given by one partner for an amount including a joint and separate debt, the learned Judge amended the declaration by inserting a common count for the consideration of the joint debt; *Ellston* v. *Deacon*, L. R., 2 C. P. 21.

(*p*) *Ex parte Bonbonus*, 8 Ves. 540; *Wells* v. *Masterman*, 2 Esp. 731; *Green* v. *Deakin*, 2 Stark. 347; *Ex parte Gouldney*, 2 G. & J. 118; 8 L. J., Bktcy. 1, S. C.

(*q*) *Ridley* v. *Taylor*, 13 East, 175.

(*r*) *Hogg* v. *Skene*, 34 L. J., C. P. 153.

(*s*) See *Hogg* v. *Skene*, *supra*.

(*t*) *Galway* v. *Mathew*, 10 East, 264; 1 Camp. 403, S. C.

(*u*) *Jones* v. *Corbett*, 2 Q. B. 828; *Grout* v. *Enthoven*, 1 Exch. 382.

(*v*) *Grant* v. *Hawkes*, Chitty, 42; *Hogg* v. *Skene*, 34 L. J., C. P. 153.

CHAPTER V.

not necessary for the plaintiff to prove that he gave value, but the defendants must affect the plaintiff with notice of the fraud (*w*), or otherwise impeach his title.

When a man is partner in two firms of the same name.

If a man be at one and the same time a partner in two distinct firms, but each firm use the same style, and he draw a bill in the common name of both firms, it has been held, that an indorsee may charge either firm at his election (*x*).

But where the name of the firm is the same as the name of the individual, and the bill is drawn by the individual for his separate benefit, perhaps the firm is not pledged (*y*).

New partner.

If a new partner be introduced into a firm, an acceptance by the old partners for an old debt in the name of the new firm will not, in the hands of the party taking it and cognizant of the facts, bind the new partner (*z*).

Taking fresh security.

The taking security from one of several partners, joint makers of a note, or acceptors of a bill, will, in general, discharge the other co-partners (*a*). But where one of three partners, after a dissolution of partnership, undertook to pay a particular partnership debt on two bills of exchange, and that was communicated to the holder, who consented to take the separate notes of the one partner for the amount, strictly reserving his right against all three, and retained possession of the original bills, it was held that, the separate notes having proved unproductive, he might still resort to his remedy against the other partners: and that the taking under these circumstances the separate notes, and even after-

(*w*) *Musgrave* v. *Drake*, 5 Q. B. Rep. 185. The case of *Grant* v. *Hawkes*, however, does not appear to have been brought to the notice of the Court, though, perhaps, distinguishable. And in a recent case in the Court of Common Pleas, Mr. Justice Willes intimated his dissent from the doctrine laid down in *Musgrave* v. *Drake*. *Hogg* v. *Skene*, 34 L. J., C. P. 153.

(*x*) *Baker* v. *Charlton*, Peake's N. P. C. 80; *M'Nair* v. *Fleming*, Mont. 32; *Swan* v. *Steel*, 7 East, 210; 3 Smith, 109, S. C.; see, however, *Ex parte Buckley*, *In re Clarke*, 14 M. & W. 469; 15 L. J., Bktcy. 3, S. C.

(*y*) See *Ex parte Bolitho*, 1 Buck. 100, and the observations of Bayley, B., on that case in *Wintle* v. *Crowther*, 1 C. & J. 316; 1 Tyr. 210, S. C.; and see *Furze* v. *Sharwood*, 11 L. J., Q. B. 121; 2 Q. B. 388, S. C., and *Ex parte Buckley*, *supra*. So, in America it has been held that primâ facie the firm are not bound: Byles on Bills, 5th American edition, p. 131.

(*z*) *Shirreff* v. *Wilks*, 1 East, 48.

(*a*) *Evans* v. *Drummond*, 4 Esp. 89; *Thompson* v. *Perceval*, 5 B. & Ad. 925; 3 N. & M. 667, S. C.

wards renewing them several times successively, did not amount to satisfaction of the joint debt (*b*).

Ratification.

Where the circumstances were such that the partner had no power to bind the firm by a bill, subsequent recognition of the act will be equivalent to previous authority (*c*).

DORMANT OR SECRET PARTNER.

His liabilities and rights.

Secondly, as to the case of a secret or dormant partner. A dormant partner, whose name does not appear, is bound by bills drawn, accepted or indorsed by his co-partners *in the name of the firm*, and not only when the bills are negotiated for the benefit of the firm, but when they are given by one of the partners for his own private debt, provided the holder were not aware of this circumstance (*d*): for credit is given to the firm generally, of whomsoever it may consist.

But where a man agreed to become a dormant partner in a firm, and the secret partnership was to commence from a time past, and after the stipulated time for the commencement of the partnership, but before the actual agreement, the members of the firm had negotiated bills in the name of the firm, and applied the proceeds to their own benefit, the incoming partner, though a partner by relation at the time the bills were negotiated, was held not liable. He could not be charged on the ground of interest, for he derived no benefit from the bills; nor on the ground of credit having been given to him, for he was no member of the firm at the time; nor on the ground of having ratified the acts of his co-partners, for there can be no ratification where there was no assumed authority (*e*).

Joinder in actions.

A dormant partner may join and sue on a bill (*f*), or the ostensible partner may sue alone (*g*). But the non-joinder

(*b*) *Bedford* v. *Deakin*, 2 B. & Ald. 210; 2 Stark. 178, S. C.

(*c*) *Duncan* v. *Lowndes*, 3 Camp. 478; and see *Vere* v. *Ashby*, 10 B. & C. 288; and *Wilson* v. *Tumman*, 6 M. & G. 236. As to banking partnerships, see *Corporations and Companies*.

(*d*) *Vere* v. *Ashby*, 10 B. & C. 288; *Lloyd* v. *Ashby*, 2 B. & Ad. 23; *Swan* v. *Steel*, 7 East, 210; 3 Smith, 199, S. C.

(*e*) *Vere* v. *Ashby*, 10 B. & C. 288; see *Battley* v. *Lewis*, 1 M. & G. 155; 1 Scott, N. R. 143, S. C., and *Wilson* v. *Tumman*, 6 M. & G. 236.

(*f*) *Cothay* v. *Fennell*, 10 B. & C. 671; *Skinner* v. *Stocks*, 4 B. & A. 437.

(*g*) *Leveck* v. *Shafto*, 2 Esp. 468; *Lloyd* v. *Archbowl*, 2 Taunt. 324; and see *Mawman* v. *Gillett*, 2 Taunt. 325, n.; *Kell* v. *Nainby*, 10 B. & C. 20.

CHAPTER V.

of a dormant partner as defendant cannot be pleaded in abatement (*h*).

NOMINAL PARTNER.

Thirdly, as to a mere nominal or ostensible partner. Though a man really have no interest in a firm, yet if he suffer himself to be held out to the world as a member of it, he hereby authorizes those *to whom he has been so held out* to treat him as a contracting party; for as they cannot know whether his interest be merely apparent or real, they would be injured and defrauded, if they could not charge him as a partner (*i*).

DISSOLUTION.

Fourthly, as to the consequences of a dissolution. After a dissolution, the ex-partners have no longer power to bind each other by bills or notes to persons aware of the dissolution (*k*). But notwithstanding a valid dissolution of an ostensible partnership by an agreement between the partners, still as between the firm and the world the authority of the ex-partners to bind each other by bills, notes or other contracts, within the scope of the former partnership, continues till the dissolution be duly notified.

Such notice may be either express or implied.

Express notice of it.

The only safe mode of proceeding is to give express notice to every person who has had dealings with the firm, and as the holders of negotiable securities often cannot be known, the best and usual course is also to advertise the dissolution in the *London Gazette*.

The ex-partners are not safe against any of the persons whose names are on a bill of exchange, unless notice be given to each. After a dissolution, one of the ex-partners accepted a bill in the name of the firm; the payee had no notice of the dissolution, but the indorsee had. It was held, that though the indorsee had had notice of the dissolution, he could recover on the bill against the firm, because the payee

(*h*) *De Mautort* v. *Saunders*, 1 B. & Ad. 898. The share of a dormant partner does not pass to assignees in bankruptcy under the reputed ownership clause; see *Reynolds* v. *Bowley*, L. R., 2 Q. B. 474; 36 L. J. 1, and S. C. 247, in error.

(*i*) Where the contract is made with a firm in which there is a nominal partner, the real partner may sue alone without joining the nominal partner as co-plaintiff. *Kell* v. *Nainby*, 10 B. & C. 20. To make a man liable as a nominal partner he must have been held out as such *to the plaintiff*. Per Parke, J., *Dickenson* v. *Valpy*, 10 B. & C. 141; 5 M. & Ry. 126, S. C.; *Gurney* v. *Evans*, 3 H. & N. 122.

(*k*) *Heath* v. *Sansom*, 4 B. & Ad. 172; 1 Nev. & M. 104, S. C.

had had no notice, and the indorsee had a right to stand on the payee's title (*l*).

Implied or indirect notice.

When bankers had dissolved partnership, a corresponding change in their printed check was, as against a person who was an old customer, but had drawn a check in the new form, held sufficient notice of the dissolution. Lord Ellenborough—"I think the change was sufficiently notified by the change in the check. It is the habit of banking houses to intimate in this manner that a partner has been introduced or has retired" (*m*).

Where a bill had been accepted by an ex-partner in the name of the firm, in favour of an attorney who had a year before prepared a draft of a deed of dissolution between the partners, which deed it did not appear had ever been executed, Lord Ellenborough held, that if the attorney would insist on the continuance of the partnership, it lay on him to show that the intention to dissolve had been abandoned (*n*).

A notice of the dissolution in the *Gazette* is not sufficient to exempt a retiring partner from responsibility to a former dealer with the firm, unless it be shown that such dealer was in the habit of reading the *Gazette* (*o*). But a mere notice in the *Gazette* has been held, as against a man who had had no previous dealings with the firm, evidence from which a jury might infer notice of dissolution (*p*). An advertisement of a dissolution in a newspaper is not even admissible, without proof that the party sought to be affected with such notice took in the newspaper (*q*). But in that

(*l*) *Booth* v. *Quin*, 7 Price, 193.

(*m*) *Barfoot* v. *Goodhall*, 3 Camp. 147; and see *Vise* v. *Fleming*, 1 Younge & J. 227.

(*n*) *Paterson* v. *Zachariah*, 1 Stark. 71.

(*o*) *Godfrey* v. *Turnbull*, 1 Esp. 371; *Leeson* v. *Holt*, 1 Stark. N. P. C. 186; *Graham* v. *Hope*, Peake's N. P. C. 154; *Gorham* v. *Thompson*, Ib. 42; *Rex* v. *Holt*, 5 T. R. 443; *Williams* v. *Keats*, 2 Stark. N. P. C. 290; see also *Ex parte Usburne*, 1 Glyn & Jam. 358. A notice of dissolution in the *Gazette* may be given in evidence without a stamp. *Jenkins* v. *Blizard*, 1 Stark. N. P. C. 418.

(*p*) *Godfrey* v. *Turnbull*, 1 Esp. 671; *Newsome* v. *Coles*, 2 Camp. 617. It has been established in America, that notice in the *Gazette* or in any other public and proper manner is sufficient, as against persons who had no previous dealings with the firm. See the authorities, Byles on Bills, 5th American edition, p. 135; 3 Kent's Com. 66; and see *Farrar* v. *Deflinne*, 1 C. & K. 580.

(*q*) *Leeson* v. *Holt*, 1 Stark. 186; *Boydell* v. *Drummond*, 11 East, 142; *Norwich Navigation Company* v. *Theobald*, 1 M. & M., N. P. C. 153; *Jenkins* v. *Blizard*, 1 Stark. 420; *Hovil* v. *Browning*, 7 East, 161; *Rowley* v. *Horne*, 3 Bing. 2; 10 Mo. 247.

CHAPTER V.

case it is not necessary that the dissolution should have been advertised in the *Gazette* (*r*).

Notice of retirement of secret partner.

A secret partner is not liable after a dissolution, though without notice, on a bill or note given by the continuing partners in the name of the firm ; for the contract was not made on his credit, nor had he any interest in it (*s*).

Notice of dissolution.

Where the dissolution is by death, notice is not necessary to protect the estate of the deceased (*t*).

Effect of dissolution.

After a dissolution, and due notice thereof, the ex-partners become tenants in common of the partnership effects, and their authority as mutual agents is at an end.

One ex-partner cannot, therefore, indorse in the name of the firm a bill which belonged to the firm, but all must join (*u*), though the ex-partner indorsing have authority to settle the partnership affairs. "I even doubt much," says Lord Kenyon, "if an indorsement were actually made on a bill or note before the dissolution, but the bill or note was not sent into the world till afterwards, whether such indorsement would be valid" (*x*).

When authority to indorse after dissolution may be inferred.

But a statement by the ex-partner that he had left the assets and securities in the hands of the continuing partner, and that he had no objection to his using the partnership name, is evidence from which a jury may infer an authority to indorse (*y*). An authority to indorse may be inferred, though the written agreement of dissolution contain no such authority. But an authority to the continuing partner "to wind up the business" will not enable him to indorse the securities of the late firm (*z*). Both ex-partners ought, therefore, to indorse, for that is the proper mode of indorsing by persons who are not partners (*a*). But if the outgoing partner suffer his name to appear as partner, new customers, notwithstanding notice in the *Gazette*, may charge him. K. and A. dissolved partnership, and advertised the dissolution in the *Gazette*. K. accepted a bill in the name of

(*r*) *Booth* v. *Quin*, 7 Price, 193.

(*s*) *Evans* v. *Drummond*, 4 Esp. 89; *Newmarch* v. *Clay*, 14 East, 239; *Heath* v. *Sansom*, 4 B. & Ad. 172; 1 N. & M. 104, S. C.

(*t*) *Vulliamy* v. *Noble*, 3 Mer. 619.

(*u*) *Abel* v. *Sutton*, 3 Esp. 108; *Kilgour* v. *Finlayson*, 1 H. Bl. 155; but see *Lewis* v. *Reilly*, 1 Q. B. 349.

(*x*) *Abel* v. *Sutton*, 3 Esp. 108.

(*y*) *Smith* v. *Winter*, 4 M. & W. 454.

(*z*) Ibid.

(*a*) *Carvick* v. *Vickery*, 2 Doug. 653, n.

the firm, ante-dating it, so that it appeared to have been drawn before the dissolution. This bill came into the hands of the indorsee, for value, without actual notice of the dissolution. A. had allowed his name to remain over the door of a hatter's shop in the Poultry, where the business had been carried on. Lord Ellenborough held A. liable on the bill, observing, that he had imprudently suffered notice to be given of the continuance of the partnership by permitting his name to remain over the door (*b*).

Dissolution by death.

If one partner die, being liable or entitled on a bill or note, the legal right or liability survives, but the personal representatives of the deceased are entitled or liable in equity (*c*).

By bankruptcy.

Bankruptcy is a dissolution, and therefore it was held, before the 2 & 3 Vict. c. 29, that an indorsement by one of the several partners, after a secret act of bankruptcy, is invalid (*d*). But it has been also held, that, as the ex-partners still hold themselves out to the world as partners, they are liable to third persons (*e*).

OCCASIONAL PARTNERSHIPS.

Lastly, as to an occasional partnership.

A partnership may be either a general partnership, or a particular one for a single transaction.

An interest in the profits of a single transaction makes a man a partner, and liable to third parties (*f*).

A joint security given by one partner, in a mere occasional partnership for a private debt, does not charge his co-partner, though in the hands of a *bonâ fide* holder for value (*g*).

EXECUTORS AND ADMINISTRATORS.

The executor of a deceased party to a bill or note has, in general, the same rights and liabilities as his testator. "The executors of every person," says Lord Macclesfield, "are implied in himself, and bound without naming" (*h*).

(*b*) *Williams* v. *Keats*, 2 Stark. 290; and see *Newsome* v. *Coles*, 2 Camp. 617; *Stables* v. *Ely*, 1 C. & P. 614.

(*c*) *Lane* v. *Williams*, 2 Vern. 277; *Bishop* v. *Church*, 3 Ves., sen. 100, 371; *Vulliamy* v. *Noble*, 3 Mer. 614; *Heath* v. *Percival*, 1 P. Wms. 682; 1 Stra. 403, S. C. But the right of survivorship in partnership chattels of a trading firm does not exist. (*Buckley* v. *Barber*, 6 Exch. 164.)

(*d*) *Thomason* v. *Frere*, 10 East, 418.

(*e*) *Lacy* v. *Woolcot*, 2 D. & R. 458.

(*f*) *Heyhoe* v. *Burge*, 19 L. J., C. P. 243; 9 C. B. 431, S. C.

(*g*) *Williams* v. *Thomas*, 6 Esp. 18.

(*h*) *Hyde* v. *Skinner*, 2 P. Wms. 196. See *Williams* v. *Burrell*, 1 C. B. 402.

CHAPTER V.

Their rights and duties.

Therefore, if a bill be indorsed to a man who is dead, by a person ignorant of his death, that will be an indorsement to the personal representative of the deceased (*i*). On the death of the holder of a bill or note, his executors or administrators may indorse (*k*); and an indorsement by the executors or administrators is for all purposes as effectual as an indorsement by the deceased (*l*).

Presentment (*m*), notice of dishonour and payment should be made by and to the executor or administrator, in the same manner as by or to the deceased.

If the holder be dead and the executor have not yet proved the will, still it seems the executor is bound to present the bill when presentable (*n*); for his title to his testator's property is derived exclusively from the will, and vests in him from the moment of the testator's death (*o*). But, as the title of an administrator is derived wholly from the Court of Probate, and he has none till the letters of administration are granted, he would probably be excused by impossibility.

Effect of probate.

A probate, being a judicial act of the Court of Probate, is conclusive as to the validity and contents of the will, and the title of the executor; and, as long as it remains unrepealed, cannot be impeached in the other Courts. Therefore, a voluntary payment to an executor who has obtained probate of a forged will, is a discharge to the debtor, notwithstanding that the probate is afterwards declared null (*p*).

Bills of exchange are to be paid in the course of administration as simple contract debts. They are *bona notabilia*; not, as in a case of specialty, where the instrument is, but where the debtor resides at the time of the creditor's death (*q*).

Debtor made executor.

It is a general rule of law, that if a creditor constitute his debtor executor, the debt is released and extinguished; for the same hand being at once to receive and pay, the action is suspended; and a personal action once suspended by act of the parties, is gone for ever (*r*). Hence it follows,

(*i*) *Murray* v. *East India Company*, 5 B. & Ald. 204.

(*k*) *Rawlinson* v. *Stone*, 3 Wils. 1; 3 Stra. 1260, S. C.

(*l*) *Watkins* v. *Maule*, 2 Jac. & Walker, 243.

(*m*) Molloy, 2, 10.

(*n*) Marius, 135; Molloy, 2, 10; Poth. 146.

(*o*) Com. Dig. Adminis. B. 10; *Woolley* v. *Clark*, 5 B. & Ald. 745-6; 1 D. & Ry. 409, S. C.

(*p*) *Allen* v. *Dundas*, 3 T. R. 125.

(*q*) *Yeomans* v. *Bradshaw*, Carthew, 373; 3 Salk. 70, S. C.

(*r*) Year Book, 20 Edw. 4, 17; 21 Edw. 4, 36; Dyer, 140; *Ned-*

that if the holder of a bill appoint the acceptor his executor, the acceptor is discharged, and all the other parties also, for a release to the principal discharges the surety. So it has been decided, that if the payee of a note, payable on demand, constitute the maker of the note his executor, the maker is discharged, not only from his liability to the estate of the testator, but also from his liability *as maker* to an indorsee to whom the executor assigned it after the testator's death (*s*). But it is conceived that if the note, at the time of the testator's death, had been in the hands of an indorsee, the maker would still have been liable as maker to the indorsee, and that if the note had been payable at a future time, and indorsed by the executor after the testator's death, but before the note was due, the maker would have been liable as maker to an indorsee without notice; for since a premature secret payment by the maker would not have protected him (*t*), no more, it should seem, would a premature secret release to him (*u*).

If one of several joint debtors be appointed executor, it is a release to all (*x*); and though they were liable severally as well as jointly, for judgment and execution against one would have been a discharge to all (*y*); and an express release to one might have been pleaded in bar by all (*z*). The debt is also released where one only of several executors is indebted (*a*), and though the executor die without having either proved the will or administered (*b*).

But if a sole executor refuses to act, the debt is not discharged (*c*). If the creditor makes the executor of the debtor his executor, that is no discharge (*d*).

ham's case, 8 Rep. 135, *a*; *Fryer* v. *Gildridge*, Hobart, 10; *Sturleyn* v. *Albany*, Cro. Eliz. 150; *Dorchester* v. *Webb*, Cro. Car. 372; *Wankford* v. *Wankford*, 1 Salk. 299; *Cheetham* v. *Ward*, 1 Bos. & Pul. 630. But the rule as to suspension is not universal See the Chapter on SUSPENSION.

(*s*) *Freakly* v. *Fox*, 9 B. & C. 130; 4 Man. & R. 18, S. C. See also *Harmer* v. *Steele*, 4 Exch. 1. Such a release in law might formerly have been made by an infant testator at the age of seventeen years complete; Co. Litt. 264, *b*.

(*t*) *Burbridge* v. *Manners*, 3 Camp. 193.

(*u*) *Dod* v. *Edwards*, 2 C. & P. 102.

(*x*) Wentworth, Off. Exors. c. 2; Com. Dig. Admin. B. 5.

(*y*) Bro. Ab. Exors. p. 118; *Fryer* v. *Gildridge*, Hob. 10; *Cheetham* v. *Ward*, 1 Bos. & Pul. 630; *Wankford* v. *Wankford*, 1 Salk. 299.

(*z*) 2 Rol. Abr. 412; *Clayton* v. *Kynaston*, 2 Salk. 574; 2 Saund. 47, *t*.

(*a*) Bro. Exors. pl. 114; Went. Off. Exors. c. 2, pp. 74, 75, 14th ed.; Com. Dig. Adm. B. 5; *Wankford* v. *Wankford*, 1 Salk. 299, by Powel, J.; *Cheetham* v. *Ward*, 1 Bos. & Pul. 630.

(*b*) *Wankford* v. *Wankford*, 1 Salk. 229; Went. c. 2; Com. Dig. Adm. B. 5.

(*c*) *Wankford* v. *Wankford*, 1 Salk. 299; but see *Abram* v. *Cunningham*, 1 Vent. 303; Butler's Co. Litt. 264, *b*.

(*d*) Bac. Ab. Exors. A 10;

CHAPTER V.

Though the appointment of a debtor to be executor releases him from liability to the first or any subsequent representatives of the testator, yet the debt is still assets in his hands in favour both of creditors and legatees (*e*).

Debt is assets.

Debtor becoming administrator.

The taking out letters of administration by a debtor to his creditor is merely a suspension of the legal remedies as between the parties: but being the act of the law, and not the act of the intestate, it is no extinguishment of the debt, for the action will revive when the affairs of the intestate and of the administrator are no longer in the hands of the same person (*f*).

Where executors may sue as such.

If a note or a bill be made or indorsed to an executor as executor, he may sue on it in his representative capacity, and join counts on promises to the testator (*g*); and a note given to the executor for a debt due to the testator will go to the administrator *de bonis non* (*h*). Though a payment of the amount of the instrument to the administrator of the executor would be good in equity, and perhaps at law (*i*). After considerable conflict, the rule of law is now firmly established, that whenever the money sought to be recovered is assets, the executor may sue, as executor, on a contract made with himself in his representative capacity, and join counts on promises to his testator (*k*). Thus, to counts on a bill or note given to his testator, he may join a count for money paid by himself as executor (*l*); a count for goods sold by himself (*m*), for works done by himself (*n*); a count on an account stated with the plaintiff as executor, of monies

Dorchester v. *Webb*, Cro. Car. 372; W. Jones, 345, S. C.; 1 Salk. 305; *Alston* v. *Andrew*, Hutton, 128.

(*e*) Bac. Ab. Exors. A. 10; *Brown* v. *Selwyn*, Cases temp. Talbot, 241, 242; *Holiday* v. *Boas*, 1 Rol. Abr. 920; *Woodward* v. *Lord Dacy*, Plowd. 186; *Dorchester* v. *Webb*, Cro. Car. 373; Shep. Touchstone, 497-8; *Wankford* v. *Wankford*, 1 Salk. 299. See Wentworth, Off. Exors. c. 2.

(*f*) *Sir John Needham's case*, 8 Coke, 135; *Wankford* v. *Wankford*, 1 Salk. 299; Wentworth, Off. Exors. c. 2; *Lockier* v. *Smith*, 1 Sid. 79; 1 Keb. 313, S. C.; *Hudson* v. *Hudson*, 1 Atk. 461.

(*g*) *King* v. *Thom*, 1 T. R. 487.

(*h*) *Catherwood* v. *Chabaud*, 1 B. & C. 150; 2 Dowl. & R. 271; *Court* v. *Partridge*, 7 Price, 591.

(*i*) *Barker* v. *Talcot*, 1 Vern. 473; and see the remarks of Lord Tenterden on this case, in *Catherwood* v. *Chaubaud*, 1 B. & C. 150; 2 Dowl. & R. 271.

(*k*) 2 Wms. Saunders, 117, *d*.

(*l*) *Ord* v. *Fenwick*, 3 East, 104. As to money lent, see *Webster* v. *Spencer*, 3 B. & Ald. 365.

(*m*) *Cowell* v. *Watts*, 6 East, 405; 9 Smith, 410, S. C.

(*n*) *Marshall* v. *Broadhurst*, 1 C. & J. 403; *Edwards* v. *Grace*, 2 M. & Wels. 190; 5 Dowl. 302, S. C.

due to the testator (*o*); or a count on an account stated with the plaintiff as executor, of monies due to himself as executor (*p*).

Delivery by executor after indorser's death.

An executor cannot complete his testator's indorsement by delivering the instrument (*q*), which has been already signed by the testator.

Whether one of several can indorse.

It has been said that an indorsement by one of several co-executors, in his own name alone, will not suffice to transfer the property in a bill of exchange, although it be an indorsement in fact, for forgery of which an indictment may be sustained (*r*).

When an executor is personally liable.

An executor, like an agent, is personally liable on making, drawing, indorsing or accepting negotiable instruments, though he describe himself as executor, unless he expressly confine his stipulation to pay out of the estate (*s*).

Joinder of common counts in actions against executors.

In an action against an executor, on a bill or note of his testator, a count for money had and received by defendant, as executor, cannot be joined (*t*); nor a count for money lent to the executor (*u*); nor a count for goods sold to the executor or work done for him (*x*). A count for money paid to the use of the executor probably may (*y*). A count on an account stated by the executor, of monies due by the testator (*z*), may be joined; and so may an account on an account stated by the executor, of monies due from him as execu-

(*o*) *Jobson* v. *Forster*, 1 B. & Ad. 6.

(*p*) *Dowbiggin* v. *Harrison*, 9 B. & C. 666; 4 Man. & R. 662, S. C.

(*q*) *Bromage* v. *Lloyd*, 1 Exch. 32.

(*r*) *Winterbottom's case*, 1 Dennison's C. C. 51; 2 Car. & Kir. 37, S. C. It has been so held in America. *Smith* v. *Whiting*, 9 Mass. Rep. 320. But it has also been there held that a note may be transferred by one of several administrators, *Sanders* v. *Blane*, 6 J. J. Marsh, 446; and by one of several executors, as a collateral security for a judgment against the estate. *Wheeler* v. *Wheeler*, 9 Cowan, 34.

(*s*) *Child* v. *Monins*, 2 B. & B. 460; 5 Moo. 281; *King* v. *Thom*, 1 T. R. 489; *Ridout* v. *Bristow*, 1 Tyrw. 90; 1 C. & J. 231, S. C.; *Serle* v. *Waterworth*, 4 M. & W. 9; 6 Dowl. 684, S. C.; *Nelson* v. *Serle*, 4 M. & W. 795; *Liverpool Borough Bank* v. *Walker*, 4 De G. & J. 24.

(*t*) *Jennings* v. *Newman*, 4 T. R. 347; *Ashby* v. *Ashby*, 7 B. & C. 444; 1 Man. & R. 180, S. C.

(*u*) *Rose* v. *Bowler*, 1 Hen. Bla. 108.

(*x*) *Corner* v. *Shew*, 3 M. & Wels. 350; *Kitchenman* v. *Skell*, 3 Exch. 49.

(*y*) *Ashby* v. *Ashby*, 7 B. & C. 444; 1 Man. & R. 180.

(*z*) *Secar* v. *Atkinson*, 1 H. Bla. 102.

CHAPTER V.

tor (*a*). Wherever the judgment on a common count is *de bonis testatoris*, the count may be joined; but where the judgment is *de bonis propriis*, it cannot (*b*).

INFANTS.

An infant can make a binding contract for necessaries only; and he may give a single bill (which is a bond without a penalty) for the exact sum due for necessaries, but not a bond with a penalty, or carrying interest (*c*).

What are to be considered necessaries (*d*) depends on the rank and circumstances of the infant in the particular case.

All his other contracts are distinguishable into two sorts, *voidable* and *void*. A distinction usually of importance: first, because a voidable contract may be afterwards affirmed, but a contract absolutely void is incapable of confirmation (*e*); and, secondly, because a void contract may be treated by other parties as a nullity, but contracts voidable can only be avoided by the contracting party himself. Yet the precise criterion of this distinction is not in the case of infancy clearly settled. According to some authorities it depends entirely on the *mode* of the transaction; and all such gifts, grants or deeds of an infant as take effect by the delivery of his hand, are only voidable; whereas such as do not so take effect are void (*f*). According to others, if the act be for the advantage of the infant, it is voidable: if for his disadvantage, absolutely void (*g*).

Infant's acceptance.

The acceptance of an infant is at all events invalid (*h*), and cannot be confirmed by a promise to pay made after he is

(*a*) *Powell* v. *Graham*, 7 Taunt. 581; 1 Moo. 305; *Ashby* v. *Ashby*, 7 B. & C. 444; 1 M. & R. 180.

(*b*) See 2 Wms. Saund. 117, *c*.

(*c*) Co. Litt. 172, *a*., n. 2; *Russell* v. *Lee*, 1 Lev. 86; and, therefore, a bond cannot be set up by a promise to pay made after full age, and the replication of such promise is ill. *Baylis* v. *Dineley*, 3 M. & Sel. 477; see B. N. P. 182; *Hunter* v. *Agnew*, 1 Fox & Smith, 15; 1 Rol. Ab. 729; *Fisher* v. *Mowbray*, 8 East, 330. A bond with a penalty given by an infant seems to be absolutely void. *Ayliffe* v. *Archdale*, Cro. Eliz. 920; Vin. Ab. Actions, D. d.

(*d*) See the observations of the Court in a very singular case; *Chappell* v. *Cooper*, 13 M. & W. 252.

(*e*) But see *Williams* v. *Moore*, 11 M. & W. 256.

(*f*) Perkins, 12.

(*g*) *Zouch* v. *Parsons*, 3 Burr. 1794, recognized as law by Lord Eldon in —— v. *Handcock*, 17 Ves. jun. 383; and see *Holt* v. *Ward*, 2 Stra. 937; *Williams* v. *Moore*, 11 M. & W. 256. A voidable contract has been defined as a contract valid till disaffirmed. *Allen* v. *Allen*, 2 D. & W. 307; 1 C. & L. 427. (Irish.)

(*h*) *Williamson* v. *Watts*, 1 Camp. 552; and see *Williams* v. *Harrison*, Carthew, 160; 3 Salk. 197, S. C.

of age, and *after* action brought (*i*). And all his contracts made in the course of trade were formerly considered absolutely void and incapable of confirmation, though the moral obligation to fulfil them would support an express promise to pay after full age, and before action brought (*k*). It has been held that no mere acknowledgment, or part payment, would, under such circumstances, create a liability (*l*). But it now seems that an infant's contract on a bill or note is voidable only (*m*), and that his liability may be established by ratification after full age (*n*).

Ratification.

The stat. 9 Geo. 4, c. 14, enacts, that no action shall be maintained whereby to charge any person upon any promise made after full age, to pay any debt contracted during infancy, or upon any ratification after full age of any promise or simple contract made during infancy, unless such promise or ratification shall be made by some writing signed by the party to be charged therewith. Oral evidence may supply defects in the written ratification as to the sum, the date, and the person to whom it is addressed (*o*).

A person of full age, who accepts a bill drawn while he was an infant, is liable on the bill (*p*).

An infant may after he comes of age ratify an account stated (*q*). But unless he have complete information, and full knowledge of the transaction, his ratification will not bind in equity (*r*).

Blank acceptance or indorsement.

It is conceived that a bill drawn, indorsed, or accepted in blank by an infant, and filled up without his express consent after he is of full age, will not bind him (*s*).

(*i*) *Thornton* v. *Illingworth*, 2 B. & C. 824; 4 Dowl. & R. 545, S. C.

(*k*) Ibid.; *Hunt* v. *Massey*, 5 B. & Ad. 902; 2 Nev. & M. 109, S. C. Whether a ratification be in all cases a new contract, resting on the original obligation as a moral consideration, or whether it merely impart validity to the original promise, has been considered doubtful. *Williams* v. *Moore*, 11 M. & W. 256; but see *Harris* v. *Wall*, 1 Exch. 122.

(*l*) *Thrupp* v. *Fielder*, 2 Esp. 628. Such is the law in America. Byles on Bills, 5th American edition, p. 146.

(*m*) Such also is the result of the American authoritics. See Byles on Bills, 3rd American edition, pp. 119 and 120.

(*n*) *Harris* v. *Wall*, 1 Exch. 122.

(*o*) *Hartley* v. *Wharton*, 11 Ad. & Ell. 934.

(*p*) *Stevens* v. *Jackson*, 4 Camp. 164.

(*q*) *Williams* v. *Moore*, 12 L. J., Ex. 253; 11 M. & W. 256, S. C.

(*r*) *Kay* v. *Smith*, 21 Beav. 522.

(*s*) *Hunt* v. *Massey*, 5 B. & Ad. 902; 2 Nev. & M. 109, S. C.

CHAPTER V.

Note for necessaries.

Whether a promissory note, given by an infant for necessaries, be valid, either at the suit of the original payee, or his indorsee, has never been expressly decided; but, it should seem, it is not, for even if not transferable it carries interest (*t*). An infant is not bound by an account stated, in respect even of necessaries (*u*).

Party with another.

If an infant be a party, jointly with an adult, to a negotiable instrument, the owner may sue the adult alone, without taking notice of the infant (*v*). Where an infant is partner in a firm, unless, on coming of age, he notifies the discontinuance of the partnership, he is liable for contracts made by the firm after his majority (*x*).

Liability ex delicto.

Where an infant is not liable on a contract, he cannot be made liable thereon by suing him in an action in form *ex delicto* (*y*). Thus he is not liable on a bill because he represented himself to be of full age, nor can the plaintiff reply that fact on equitable grounds (*z*).

May convey title to a bill.

An infant drawing and indorsing bills may convey a title to the indorsee, so that the indorsee can sue the acceptor and all other parties, except the infant himself (*a*); but the infant may avoid the contract, except where the acceptor

(*t*) *Trueman* v. *Hurst*, 1 T. R. 40; Bayley, 19; *Williamson* v. *Watts*, 1 Camp. 552. In the United States it has been decided that a promissory note given by an infant for necessaries is void. *Swansea* v. *Vanderkeyden*, 10 Johns. Rep. 33; *Nightingale* v. *Withington*, 15 Massey's Rep. 272. See further, Byles on Bills, 5th American edition, p. 148. So in the French law, Pardessus, 2, 459.

(*u*) *Trueman* v. *Hurst*, 1 T. R. 40; *Bartlett* v. *Emery*, ibid. 42, *n.*; *Ingledew* v. *Douglas*, 2 Stark. 36.

(*v*) *Burgess* v. *Merrill*, 4 Taunt. 468; *Chandler* v. *Parkes*, 3 Esp. 76, n.

(*x*) *Good* v. *Harrison*, 5 B. & Ald. 147.

(*y*) *Grove* v. *Neville*, 1 Keb. 778; *Johnson* v. *Pye*, 1 Keb. 905—913; 1 Lev. 169, S. C.; *Manby* v. *Scott*, 1 Sid. 109; *Jennings* v. *Rundall*, 8 T. R. 335; *Price* v. *Hewitt*, 8 Exch. 146; and see *Cranch* v. *White*, 1 Bing. N. C. 417; 1 Scott, 314, S. C. But in some cases he is liable for fraud. Byles on Bills, 5th Amer. edition, p. 149; *Nelson* v. *Stocker*, 28 L. J., Cha. 760; *Re King*, 27 L. J., Btcy. 33; see *Wright* v. *Leonard*, *post*, 63. See also *Burnard* v. *Haggis*, 32 L. J., C. P. 191, where an infant who had hired a horse was held liable for its misuse.

(*z*) *Bartlett* v. *Wells*, 1 Best & Smith, 836.

(*a*) *Taylor* v. *Croker*, 4 Esp. 187; *Nightingale* v. *Withington*, 15 Mass. American Rep. 272; and see *Drayton* v. *Dale*, 2 B. & C. 299, 302; *Grey* v. *Cooper*, 1 Selw. N. P.; see *Smith* v. *Johnson*, 27 L. J., Exch. 363; 3 H. & N. 222, S. C.

has estopped himself by admitting (as we shall see he does) the capacity of an infant drawer to indorse (*b*).

Infant may sue.

An infant may sue on a bill (*c*). But payment should be made to his guardian, yet payment to the infant may, under some circumstances, be good (*d*).

Estoppel.

An infant is not in a case of contract estopped by his own representations (*e*).

PERSONS UNDER UNDUE INFLUENCE.

The exercise of undue influence over persons of full age giving bills, notes or other securities, affords ground for the interference of a Court of Equity, which will either set aside the securities, or by a perpetual injunction restrain all proceedings (*f*). This jurisdiction is not confined to the case of guardian and ward, but applies wherever there exists between the parties a relation or connection constituting anything like a trust or guardianship, or conferring authority, control or influence. It comprehends parents and step-parents, and may extend to other relatives, according to the circumstances of the case. It reaches not only regular medical men, but quacks and impostors. It comprehends legal advisers, such as counsel or attorney, and extends to ministers of religion of any persuasion. In these cases the Court will not suffer any such securities to be enforced, unless satisfied that they were given freely and voluntarily, and independently of any influence over the giver (*g*).

The burden of proof lies on the upholder of the instrument (*h*). The defendant in an action at law may avail himself of this defence by pleading an equitable plea, which however would not, it is conceived, be a good defence against a holder for value without notice.

LUNATICS, IDIOTS AND NON COMPOTES.

It is a general rule of universal law, that the contracts of a lunatic, an idiot, or other person *non compos mentis*, from

(*b*) See the Chapter on ACCEPTANCE.

(*c*) Chitty, 20; *Warwick* v. *Bruce*, 2 M. & Sel. 205; *Holliday* v. *Atkinson*, 5 B. & C. 501; 8 D. & R. 163, S. C.

(*d*) Bayley, 255.

(*e*) *Cannam* v. *Farmer*, 3 Exch. 698.

(*f*) *Harvey* v. *Mount*, 14 L. J., Chan. 238; *Archer* v. *Hudson*, 15 L. J. 211; *Maitland* v. *Irving*, 16 L. J. 95; *Rhodes* v. *Bate*, 35 L. J. 267, and authorities there collected; *Lyon* v. *Home*, L. R., 6 Eq. 656, and cases cited.

(*g*) *Eskey* v. *Lake*, 22 L. J. 336; *Williams* v. *Bayley*, L. R., 1 H. L.; *Ford* v. *Olden*, L. R., 5 Eq. 461.

(*h*) *Lyon* v. *Home*, L. R., 6 Eq. 681.

CHAPTER V.

age or personal infirmity, are utterly void (*i*). And the old authorities in the English law, that a man cannot be allowed to stultify himself by alleging his own lunacy, are shaken by the modern decisions (*k*).

But it had been before held, that if a note be made by a lunatic or person of imbecile mind, known to be so by the payee, it is a fraud in the payee, and the note is void even in the hands of an indorsee, at least if there be anything unusual on the face of the note (*l*). So, if the consideration be executory merely, it was said that it might perhaps be void, though the party dealing with the lunatic were not cognizant of his infirmity (*m*). But it was held that a defendant could not set up his own insanity as a defence, unless it were known and taken advantage of by the plaintiff, so that there was a fraud in him (*n*). And it still seems that according to the English law, in order to avoid a fair contract on the ground of lunacy, the mental incapacity must be known to the other contracting party (*o*).

Pleading.

Imbecility of mind cannot be proved under a plea that defendant did not make a promissory note (*p*).

PERSONS DRUNK.

It was formerly held, that a man could not protect himself from any deed or agreement by pleading drunkenness, unless he also showed that the drunkenness was brought about by the management and contrivance of him who procured the

(*i*) Furiosus nullum negotium gerere potest, quia non intelligit quid agit. Inst. Lib. 3, tit. 20, s. 8; Dig. Lib. 50, tit. 1. 5, 40, 124.

(*k*) Kent's Comm. 451; and see the observations of Parke, B., in *Gore* v. *Gibson*, 13 M. & W. 623; and *Alcock* v. *Alcock*, 3 M. & G. 268.

(*l*) *Sentence* v. *Poole*, 3 C. & P. 1; *Baxter* v. *Lord Portsmouth*, 2 C. & P. 178; 5 B. & C. 170; 8 Dowl. & R. 614, S. C.

(*m*) Ibid.

(*n*) *Brown* v. *Joddrell*, 1 M. & M. 105; 3 C. & P. 30, S. C.; *Levy* v. *Baker*, 1 M. & M. 106; but see *Gore* v. *Gibson*, 13 Mees. & W. 623. In *Putnam* v. *Sullivan*, 1 Massey's American Reports, it is said by Parsons, C. J., "that, perhaps, if a blind man had a note falsely and fraudulently read to him, and he indorsed it, supposing it to be the note read to him, he would not be liable as indorsee, because he is not guilty of any laches." It is, however, conceived that he must plead the fraud specially.

(*o*) *Molton* v. *Camroux*, 4 Exch. Rep. 19; *Bearan* v. *M'Donnell*, 9 Exch. 309; *Elliot* v. *Ince*, 26 L. J., Cha. 821; 7 De G., M. & G. 475, S. C. But the law of America seems more in accordance with general law, where it has been held that incapacity to contract arising from drunkenness makes a note void and incapable of confirmation. See Byles on Bills, 5th American edition, p. 152.

(*p*) *Harrison* v. *Richardson*, 1 Mood. & Rob. 504.

deed or contract (*q*). And this may still be the law in a case of *partial* drunkenness.

Partial or total.

But where there is *total* drunkenness the modern decisions have qualified the old doctrine. Total drunkenness producing a complete and manifest though temporary suspension of reason, is of itself a defence to an action on a bill or note (*r*). "It is just the same," says Alderson, B., "as if the defendant had written his name on the bill in his sleep in a state of somnambulism" (*s*).

Somnambulism.

Pleading.

But as an answer to an action on a bill or note, drunkenness must be specially pleaded (*t*).

MARRIED WOMEN.

The contracts of a married woman are void ~~in~~ law. Without authority from her husband, therefore, she cannot at law charge either him or herself, by making, drawing, accepting or indorsing negotiable instruments (*u*); not even if she live apart from him, and have a separate maintenance secured by deed (*v*). Nor after a valid divorce, *à mensa et thoro* (*w*); though it is otherwise after a complete divorce, *à vinculo matrimonii*, which annuls the marriage to all purposes. And even if she be a sole trader in London by the custom of the city, she is not liable at all in the superior Courts, and in the city Courts her husband must be joined for conformity, though execution will be against the wife alone (*x*).

Fraud.

And it is conceived, that though husband and wife are in general liable for the wrongs and frauds perpetrated by the wife, yet they are not liable for a fraudulent representation by her which is parcel of a contract (*y*).

(*q*) *Johnson* v. *Medlicotte*, 3 P. Wms. 130; *Cooke* v. *Clayworth*, 18 Vesey, 12.

(*r*) At least by a person who had notice. *Molton* v. *Camroux*, 2 Exch. 487; 4 Exch. 17, S. C.

(*s*) *Gore* v. *Gibson*, 13 M. & W. 623. Marriages have been set aside on this ground. *Browning* v. *Reane*, 2 Phil. 69.

(*t*) *Gore* v. *Gibson*, *supra*.

(*u*) She cannot, like an infant, convey a title to third persons. *Barlow* v. *Bishop*, 1 East, 432; 3 Esp. R. 266, S. C.

(*v*) *Marshall* v. *Rutton*, 8 T. R. 545. In one case the Court of C. P. refused to discharge out of custody a married woman, who had been arrested as the drawer of a bill of exchange. *Jones* v. *Lewis*, 7 Taunt. 54; 2 Marsh. 385, S. C.

(*w*) *Lewis* v. *Lee*, 3 B. & C. 291; 5 D. & R. 90, S. C.

(*x*) *Beard* v. *Webb*, 2 B. & P. 93.

(*y*) *Liverpool Association* v. *Fairhurst*, 9 Exch. 422; *Wright* v. *Leonard*, 11 C. B., N. S. 258.

CHAPTER V.

Estoppel.

Nor can a married woman be estopped by her own representation that she is discovert (*z*). But an acceptor may be estopped from disputing her competency (*a*).

Separate estate of a married woman.

But if a married woman have a separate estate, and make a promissory note, or accept a bill of exchange, she is liable in equity (*b*). And if, while she has a separate estate, she gives a security for money lent, and after her husband's death promise to repay it, such promise is binding at law on herself and her executors (*c*). But if at the time the note was given she had not a separate estate, no such promise, after the death of her husband, will be valid (*d*). A promissory note given by a husband to his wife for money advanced by her to him out of her separate estate constitutes a declaration of trust in favour of the wife (*e*).

Absence of the husband.

And if the husband has been transported, and is not returned to this kingdom, whether or no the term of his transportation be expired (*f*); or if he be an alien, and never was within the kingdom (*g*); or if the husband has been abroad and not heard of for seven years, after which period the legal presumption of his death arises:—in any one of these three cases she is liable in law for her contracts, as a single woman. Where the husband was transported for fourteen years, but instead of going abroad was confined in the hulks at Portsmouth, it was held that his wife, carrying on business in her own name, for the benefit of the family, might be made bankrupt, and that a bill, accepted by her under such circumstances, constituted a good petitioning creditor's debt (*h*).

Bill or note given to a woman before marriage.

Where a bill or note is given to a single woman, and she marries, the property vests in her husband, and he alone can

(*z*) *Cannam* v. *Farmer*, 3 Exch. 698.

(*a*) See the Chapter on ACCEPTANCE.

(*b*) *Bullpin* v. *Clarke*, 17 Ves. 366; *Hulme* v. *Tenant*, 1 Bro. C. C. 16; *Stewart* v. *Kirkwall*, 3 Madd. 387; *Johnson* v. *Gallagher*, 30 L. J., Cha. 298. *Query*, where there is a restraint on anticipation. See *Butler* v. *Cumpston*, 38 L. J., Chan. 35.

(*c*) *Lee* v. *Muggridge*, 5 Taunt. 36.

(*d*) *Lloyd* v. *Lee*, 1 Stra. 94; *Littlefield* v. *Shee*, 2 B. & Ad. 811.

(*e*) *Murray* v. *Glasse*, 23 L. J., Cha. 126.

(*f*) *Carrol* v. *Blencow*, 4 Esp. 27; *Sparrow* v. *Carruthers*, cited 2 W. Bla. 1197, and more fully 1 T. R. 7. See *Derry* v. *Duchess of Mazarine*, 1 Ld. Raym. 147.

(*g*) *Kay* v. *Duchess de Pienne*, 3 Camp. 123.

(*h*) *Ex parte Franks*, 7 Bing. 762.

indorse it (*i*); and husband and wife *must* join in the action upon it (*k*); but if payable to order, marriage may operate as an indorsement, so as to enable the husband to sue alone (*l*). If not recovered upon, or reduced into possession during their joint lives, it reverts to the woman, if she survive, or goes to the husband as her administrator, if he survive (*m*).

After marriage.

If after marriage the bill or note be made to the wife alone the interest vests in the husband; he alone can indorse it (*n*). And his indorsement is effectual, though the instrument be part of her separate estate, and be indorsed by her husband in fraud of her, to an innocent holder for value (*o*). But if the husband die without a recovery on it, or reducing it into possession, the note belongs, at law, to the wife, and not to the husband's executors, and she must bring the action (*p*). If the consideration for the note were the husband's money, it is conceived that the wife would be

(*i*) *Connor* v. *Martin*, 3 Wilson, 5; 1 Stra. 516, S. C.

(*k*) Com. Dig. Baron & Feme, N.

(*l*) *MacNeillage* v. *Holloway*, 1 B. & Ald. 218. As to some observations of Lord Ellenborough, in this case, see the judgment of the Court of Queen's Bench, in *Hart* v. *Stephens*, 14 L. J., Q. B. 149; 6 Q. B. 943, S. C.

(*m*) Co. Litt. 351, *b.*; *Coppin* v. ——, 2 P. Wms. 497; *Day* v. *Padrone*, 2 M. & S. 396.

(*n*) *Connor* v. *Martin*, 1 Stra. 516; 3 Wils. 5, S. C.; *Barlow* v. *Bishop*, 1 East, 433; *Mason* v. *Morgan*, 2 Ad. & Ellis, 30; 4 Nev. & M. 46, S. C.; but the wife may convey a title by indorsing in her husband's name, by his authority; *ibid.* And under her husband's authority, she may indorse in her own name. *Prestwick* v. *Marshall*, 7 Bing. 565; 5 M. & P. 513; 4 C. & P. 594. And if, after an indorsement in her own name, the acceptor, seeing the bill with the indorsement upon it, promises to pay, that amounts to an admission by the acceptor that the indorsement was by the husband's authority. *Cotes* v. *Davis*, 1 Camp. 485. Where in an action by the indorsee of a bill against the acceptor, the declaration alleged the bill to have been drawn and indorsed to the plaintiffs by a woman, to which the defendant pleaded that she was married, a replication that she drew and indorsed as the agent of her husband was held no departure and good. *Prince* v. *Brunatte*, 1 Bing. N. C. 435; 1 Scott, 342; 3 Dowl. 382, S. C.

(*o*) *Dawson* v. *Prince*, 27 L. J. Chanc. 169. *Query*, whether the fact of a bill being drawn in favour of a married woman be notice actual or constructive, that it is part of her separate estate.

(*p*) *Betts* v. *Kimpton*, 2 B. & Ad. 273; *Richards* v. *Richards*, 2 B. & Ad. 447; *Gaters* v. *Madely*, 6 M. & W. 423; *Hart* v. *Stephens*, 14 L. J., Q. B. 148; 6 Q. B. 937, S. C.; *Scarpellini* v. *Atcheson*, 14 L. J., Q. B. 333; *Howard* v. *Oakes*, 18 L. J., Exch. 485; 3 Exch. 136, S. C. See this last case as to the form of pleading. Coverture of the plaintiff is only pleadable in abatement. *Guyard* v. *Sutton*, 3 C. B. 153.

CHAPTER V.

a trustee for the husband's executors (*q*). The wife *may* join in an action on the instrument (*r*); but the husband may sue alone (*s*). If he sue alone, he lets in, by way of set-off, debts due from himself; if he joins his wife in the action, perhaps he lets in, as a set-off, debts due by her *dum sola* (*t*).

If a note be given after marriage to husband and wife jointly as payees, it is conceived that the legal interest in the note survives to the survivor, so held as to an investment in stock (*u*).

Reduction into possession of a wife's chose in action.

What amounts to a reduction of the wife's chose in action into possession is a question of considerable nicety. It is conceived that indorsing a note over is such a reduction (*v*). But the bankruptcy of the husband is not a reduction of the wife's choses in action into possession; and therefore the assignees of a bankrupt cannot maintain an action in their own names *alone*, on a promissory note made to the wife of the bankrupt before her marriage (*w*). Nor is the receipt of interest by the husband (*x*) a reduction into possession.

Bill or note given by a woman before marriage.

If a single woman, being a party liable on a bill or note marries, her husband becomes responsible, and they must be sued jointly (*y*). If (the debt being still unsatisfied) he dies, she is liable, and not his executors; if she dies, her representatives are liable, if there be assets, but not her husband, except in his representative capacity (*z*).

Note by a husband to his wife.

Where a joint and several promissory note was, during marriage, given to a feme executrix, by her husband and two other persons, it was held that after her husband's death she might sue the other makers (*a*). And though a note given by a wife to her husband is void, yet, if indorsed

(*q*) *Phillishirk* v. *Pluckwell*, 2 M. & Sel. 396.

(*r*) *Phillishirk et Uxor* v. *Pluckwell*, 2 M. & Sel. 393; *Arnould* v. *Revoult*, 1 B. & B. 443; 4 Moore, 70, S. C.

(*s*) *Burrough* v. *Moss*, 10 B. & C. 858; 5 M. & R. 296, S. C.

(*t*) Ibid.

(*u*) *Re Gadbury*, 32 L. J. 380.

(*v*) *Scarpellini* v. *Atcheson*, 14 L. J., Q. B. 333; 7 Q. B. Rep. 864, S. C.

(*w*) *Sherrington* v. *Yates*, in error, 12 M. & W. 855, reversing *Yates* v. *Sherrington*, 11 M. & W. 42.

(*x*) *Hart* v. *Stephens*, 6 Q. B. 937.

(*y*) *Mitchinson* v. *Hewson*, 7 T. R. 348.

(*z*) Ibid.

(*a*) *Richards* v. *Richards*, 2 B. & Ad. 447.

over by the husband, it is valid as between the husband and the indorsee (*b*).

Payment to a married woman.

Payment of a sum due on a bill or note to a married woman will not discharge the party making it, unless she had authority, express or implied, to receive payment. It should be made to her husband (*c*).

CONVICTED FELONS.

By attainder the felon's personal property and choses in action vest in the crown, without office found. The felon, till he has undergone his punishment, is incapable of taking. Therefore, if a bill be indorsed to him, he acquires no title to it (*d*).

ALIENS.

A contract in favour of an alien enemy, not residing in this country by the king's licence, is void at law and in equity. Hence a bill drawn by an alien enemy on a British subject in England, and indorsed to a British subject abroad, cannot be enforced even after the restoration of peace (*e*).

CORPORATIONS AND BANKING COMPANIES.

In general, a corporation can only contract by writing under their common seal (*f*).

(*b*) *Holy* v. *Lane*, 2 Atk. 182.

(*c*) Bayley, 256.

(*d*) *Bullock* v. *Dodds*, 2 B. & Ald. 258.

(*e*) *Willison* v. *Patteson*, 7 Taunt. 439; 1 Moore, 333, S. C.; *Brandon* v. *Nesbitt*, 6 T. R. 23.

(*f*) At common law bills of exchange and promissory notes, being simple contracts, cannot be under seal, at least so as to retain their negotiable qualities; Bac. Ab. tit. Merch. L.; Black. Com. book 2, part 2, c. 5; Story on Bills of Exchange, c. iv. s. 61; Story on Promissory Notes, c. iv. s. 55. Whence it follows that corporations cannot, in the absence of power to that effect either express or implied, accept, draw or indorse negotiable instruments; their bonds therefore or securities under seal, even though professing to be negotiable, are in the hands of a transferee liable to all the equities that may subsist between the original parties. *In re Natal Investment Company*, L. R., 3 Chan. Ap. 355; *China Steam Company*, 38 L. J., Chan. 199; L. R., 4 Chan. Ap. 240, S. C. This rule, making assignments of choses in action subject to all equities subsisting between the original parties, must however yield whenever a contrary intention appears from the nature or terms of the contract; thus where a company had issued bonds or securities under seal, professing to be negotiable, with the express intention that such instruments should be available in the hands of others besides the obligee, it was held that the title of a transferee or subsequent holder was not in equity affected by set-off or other equity existing between the original parties. See *Blakely Ordnance Company*, L. R., 3 Chan. Ap. 154, where such was the manifest intention of the agreement; see too *Watson* v. *Mid Wales Railway Company*, L. R., Ir. C. P. 593, being a case of a Lloyd's bond

CHAPTER V.

But to this rule there are exceptions (*g*). And among them is the power of issuing bills or notes enjoyed by a company incorporated for the purposes of trade, the very object of whose institution requires that they should exercise this privilege (*h*).

But a company incorporated for carrying on public works is not a corporation within the above exception (*i*).

Without a special authority, express or implied, a corporation has no power to make, indorse, or accept bills or notes (*k*). And the defence may be raised by demurrer to the declaration (*l*), plea denying acceptance, or, if there be a power not duly exercised, by a general traverse (*m*).

Form of action.

A corporation may, like natural persons, sue in assumpsit. The old doctrine that when a corporation is plaintiff the consideration must not be executory, so that promises by it need to be alleged (*n*), seems to be overruled (*o*). And a corporation is liable to be sued in the ordinary forms of action, on negotiable instruments, wherever it has the power to issue them (*p*).

Bank of England.

The capacity of corporations and banking companies to make, draw or accept negotiable instruments, is further

transferred before the set-off accrued; *Dickson* v. *Vale of Neath Railway Company*, L. R., 4 Q. B. 44; 39 L. J. 17, S. C., where an agreement had been suppressed; *General Estates Company*, L. R., 3 Chan. Ap. 758. These decisions, however, seem to have proceeded on the ground that the company ought to be estopped from taking advantage of their own wrong in professing to be able to issue negotiable instruments under seal. See the case of the *Blakely Ordnance Company*, L. R., 3 Chan. Ap. 154, where the legal effect of such a document is discussed and its negotiability and indeed its validity at law questioned.

(*g*) The reader will find them enumerated in the case of *East London Waterworks' Company* v. *Bailey*, 4 Bing. 283; and see *Henderson* v. *Australian Company*, 5 E. & B. 409; *Haigh* v. *North Bierley Union*, 1 E., B. & E. 873.

(*h*) *Broughton* v. *Manchester Waterworks' Company*, 3 B. & Al. 1.

(*i*) A railway company can neither accept, draw or indorse a bill of exchange. Ibid.; *Overend, Gurney & Co.* v. *Mid Wales Railway Co.*, L. R., 1 C. P. 499. This disability, however, seems not to extend to companies incorporated here for carrying on works abroad. See case of *Peru Railway Company*, L. R., 2 Chan. Ap. 617.

(*k*) Ibid. p. 8, Bayley, J.

(*l*) Ibid.

(*m*) *Hill* v. *Manchester & Salford Waterworks' Company*, 5 B. & Ad. 866.

(*n*) *Mayor of Stafford* v. *Till*, 4 Bing. 75; 12 Moore, 260, S. C.

(*o*) *Church* v. *Imperial Gas Company*, 6 Ad. & E. 861; *Mayor of Ludlow* v. *Charlton*, 6 M. & W. 815; *Paine* v. *Guardians of the Strand Union*, 15 L. J., M. Ca. 89; 8 Q. B. 326, S. C.; *Lamprell* v. *Billericay Union*, 3 Exch. 283.

(*p*) *Murray* v. *East India Company*, 5 B. & Al. 204.

narrowed by the following enactment, contained in the various statutes passed for protecting the privileges of the Bank of England (*q*): "That it shall not be lawful for any body, politic or corporate, whatsoever, or for any other persons whatsoever, united or to be united in covenant or partnership, exceeding the number of six persons in England, to borrow, owe or take up any sum or sums of money on their bills or notes payable at demand, or at any less time than six months from the borrowing thereof, during the continuance of the privilege of banking granted to the Governor and Company of the Bank of England" (*r*).

It has been held that these restrictions do not affect a *commercial* firm consisting of more than six persons (*s*).

But in consequence of the panic in the latter part of the year 1825, the Bank of England consented to forego a portion of their exclusive privilege: and the 7 Geo. 4, c. 46, enacts, accordingly, that corporations or co-partnerships of more than six in number, carrying on business more than sixty-five miles from London, may issue bills or notes payable on demand, and that such corporations or co-partnerships may issue notes or bills amounting to 50*l.* payable in London or elsewhere at any period after date or sight (*t*).

The third section declares, that any such corporation or partnership may discount bills not drawn by or upon them.

Each offence against the provisions of the act subjects to a penalty of 50*l.*

The act by which the Bank Charter was renewed in 1833, the 3 & 4 Will. 4, c. 98, continued the privileges bestowed on the Bank of England by the 39 & 40 Geo. 3, and subsequent acts, subject to termination on twelve months' notice to be given after the 1st August, 1844. The privileges of the Bank are now further continued by the 7 & 8 Vict. c. 32, subject to termination on twelve months' notice to be given after the 1st August, 1855.

The 3 & 4 Will. 4, c. 98, provides that no bank of more than six persons shall issue in London, or within sixty-five miles thereof, bills or notes payable on demand, saving the

(*q*) 39 & 40 Geo. 3, c. 28, s. 15.

(*r*) For the history and exclusive privileges of the Bank of England more at large, see the case of the *Bank of England* v. *Anderson*, 3 Bing. N. C. 589; 4 Scott, 50; Keen, 328.

(*s*) *Wigan* v. *Fowler*, 1 Stark. 459.

(*t*) The limitation of 50*l.* appears to be abolished by the 3 & 4 Will. 4, c. 83, s. 2, and 7 & 8 Vict. c. 32, s. 26. As to the mode of recovering penalties, see 8 & 9 Vict. c. 76, s. 5.

CHAPTER V.

rights of country bankers to make their notes payable in London (*u*).

The 3 & 4 Will. 4, c. 98, further declares that other corporations and companies of more than six persons may carry on the business of banking in London, provided they do not issue bills or notes at less than six months' date (*x*).

That the notes of the branch banks of England shall be made payable where issued (*y*).

The Bank of England can issue bank notes unstamped (*z*), and has the exclusive privilege of doing so within the city of London and three miles thereof (*a*).

No new banks of issue.

No person who was not a banker issuing his own notes on the 6th of May, 1844, can now issue bank notes (*b*).

Bank notes under 5*l.* prohibited.

Bank notes under *5l.* payable to bearer on demand are prohibited in England (*c*).

Banks not containing more than ten partners.

Banks of ten, formerly six, or fewer than six persons, existing as banks of issue before the 6th May, 1844, may issue bills and notes and promissory notes payable to bearer on demand, on unstamped paper, (except within the city of London and three miles thereof,) within the provisions of 9 Geo. 4, c. 23, s. 1.

Banks of more than ten partners.

Banking corporations and companies of more than ten (formerly six) persons cannot issue in London or within sixty-five miles thereof any bill or note payable on demand(*d*).

Every member of a banking partnership is liable to the payment of outstanding notes, though he were not a partner when they were issued (*e*).

But a more lengthened and minute inquiry into the

(*u*) 3 & 4 Will. 4, c. 98, s. 2.

(*x*) Sect. 3. Therefore a banking partnership of more than six persons in London, or within sixty-five miles thereof, could not accept a bill at less than six months drawn upon them by a customer. *Bank of England* v. *Anderson*, 3 Bing. N. C. 589; 4 Scott, 50; Keen, 328, S. C. But the restriction is relaxed by the 7 & 8 Vict. c. 32, s. 26.

(*y*) 3 & 4 Will. 4, c. 98, s. 4.

(*z*) 7 & 8 Vict. c. 32, s. 7.

(*a*) 9 Geo. 4, c. 23, s. 1.

(*b*) 7 & 8 Vict. c. 32, ss. 10, 11, 12. This privilege extends to a surviving partner in a banking firm, *Smith* v. *Everett*, 29 L. J., Cha. 236.

(*c*) 7 Geo. 4, c. 6.

(*d*) 39 & 40 Geo. 3, c. 28, s. 15; 3 & 4 Will. 4, c. 98, s. 3; and see 3 & 4 Will. 4, c. 83, s. 2. See further, *Bank of England* v. *Anderson, supra*, and *Booth* v. *Bank of England*, 6 Bing. N. C. 415; 1 Scott, N. R. 701, S. C. See also the provisions of 7 Geo. 4, c. 46; 7 & 8 Vict. c. 32, s. 26; 8 & 9 Vict. c. 76; 20 & 21 Vict. c. 49, s. 12.

(*e*) 7 Geo. 4, c. 46, s. 1.

provisions of these and other statutes regulating the rights and duties of the Bank of England and other Banks of issue would be a digression from the main subject of this work. Such a discussion would find a more appropriate place in a treatise on the law of Banks of issue, deposit and exchange.

JOINT-STOCK COMPANIES.

The law as to the liability of joint-stock companies drawing, accepting or indorsing bills, involves some nice distinctions, and is not yet very clearly settled.

At common law.

As to joint-stock companies at the common law, it is conceived to be a general rule, that if the directors accept simply in their own names, with or without authority to do so, they, and they only, are liable at law on the bills (*f*). And that they are liable at law not only to holders who are strangers, but to holders who may be also holders of letters of allotment, or holders of scrip (*g*).

If, however, having authority to bind the company by bills, the directors regularly accept, in the name of the company, a bill drawn on the company, every member of the company is liable as a joint acceptor to any holder, not being also a member of the company (*h*).

An authority, to make contracts and bargains, and to transact all matters requisite for the affairs of the company, will not in general authorize the directors to draw bills (*i*). But a limited authority to draw bills will receive a fair and reasonable construction (*k*).

Directors signing a *joint and several* note, though for themselves and the other shareholders, are personally responsible (*l*). But not necessarily so if the note be joint only (*m*). And it has been held, that if the secretary's name is countersigned *as secretary*, he also is liable (*n*).

(*f*) Page 80.

(*g*) *Fox* v. *Frith*, 10 M. & W. 131.

(*h*) See *Teague* v. *Hubbard*, 8 B. & C. 345; 2 M. & R. 369, S. C.; *Higgins* v. *Senior*, 8 M. & W. 834; *Fox* v. *Frith*, 10 M. & W. 131; *Steele* v. *Harmer*, 15 L. J., Exch. 217; 14 M. & W. 831; 19 L. J., Exch. 34; 4 Exch. 1, S. C.; *Maclae* v. *Sutherland*, 3 E. & B. 1.

(*i*) See *Harmer* v. *Steele*, 19 L. J., Exch. 34; 4 Exch. 1, S. C.; *Allen* v. *Sea Life Assurance Company*, 9 C. B. 574; *Halford* v. *Cameron Coal Company*, 20 L. J., Q. B. 160; 16 Q. B. 442, S. C.; *Edwards* v. *Same*, 6 Exch. 269.

(*k*) *Thompson* v. *Wesleyan Newspaper Association*, 8 C. B. 849.

(*l*) *Healey* v. *Story*, 18 L. J., Exch. 3; 3 Exch. 3, S. C. See also *Penhiell* v. *Connell*, 19 L. J., Exch. 305; 5 Exch. 381, S. C.

(*m*) *Lindus* v. *Melrose*, 27 L. J., Exch. 326; 2 H. & N. 293; S. C., in error, 27 L. J., Exch. 328; 3 H. & N. 177. This was a decision on the stat. 19 & 20 Vict. c. 47, s. 43.

(*n*) *Bottomley* v. *Fisher*, 31 L. J., Exch. 417; 1 H. & Colt. 211.

CHAPTER V.

If a bill be drawn on several trustees or directors who have power to bind each other, an acceptance by one in his own name is the acceptance of all (*o*).

Notice of a fact to one member of a joint-stock company is not notice to all (*p*), as in the case of a private partnership.

A bill drawn on the agent of a joint-stock company, he being a member of it, and accepted by him per procuration for the company, binds him personally as a member (*q*).

Of companies completely registered under the 7 & 8 Vict. c. 110.

The stat. 7 & 8 Vict. c. 110, s. 45 (since repealed), enacted that where the directors were authorized by deed of settlement or bye-law to issue or accept bills or notes, they should be made or accepted by two directors, and expressed to be made or accepted on behalf of the company, and countersigned by the secretary. That they might be indorsed in the name of the company by any officer authorized by deed or bye-law. That on instruments properly made the company might be sued, but the signing officers were not liable.

The liability of a company formed under this act could not be limited by the deed of settlement (*r*), and a proviso in a bill of exchange limiting the liability is repugnant and void (*s*).

On this statute it was held that an acceptance in this form "A. and B., directors appointed by resolution to accept this bill," was an acceptance within the statute (*t*).

Deed notice to persons dealing with the company.

The registered deed is notice of its contents to all who deal with the company (*u*).

Of companies registered under the later Acts.

The statute 25 & 26 Vict. c. 89, s. 47, amended by 30 & 31 Vict. c. 131, enacts, that bills and notes made, accepted or indorsed in the name of the company, by any person acting

(*o*) *Jenkins* v. *Morris*, 16 M. & W. 877.

(*p*) *Powles* v. *Page*, 3 C. B. 31; *Steward* v. *Dunn*, 12 M. & W. 664; *Peru Railway Company*, L. R., 2 Chan. Ap. 617.

(*q*) *Nichols* v. *Diamond*, 9 Exch. 154.

(*r*) *Gordon* v. *Sea Fire Society*, 1 H. & N. 599; *Re Sea Fire and Life Society*, 3 De G., M. & G. 459. See also *Peddell* v. *Gwynn*, 1 H. & N. 590, and Lindley on Partnership, vol. i. p. 201.

(*s*) *Re State Fire Insurance Company*, 32 L. J., Cha. 300.

(*t*) *Halford* v. *Cameron Coal Company*, 20 L. J., Q. B. 160; 16 Q. B. 442, S. C.; *Edwards* v. *Cameron Coal Company*, 6 Exch. 269.

(*u*) *Ridley* v. *Plymouth Company*, 2 Exch. 711; *Balfour* v. *Ernest*, 28 L. J., C. P. 170; 5 C. B., N. S. 601, S. C.; *Royal British Bank* v. *Turquand*, 5 E. & B. 248; 6 E. & B. 327.

under the authority of the company, express or implied, shall bind the company (*x*)

But if any person on behalf of a *limited* company registered under the act signs or indorses a bill, check, or note on which the name of the company is not duly mentioned (*y*), he is liable to a penalty of 50*l*., and is moreover made personally responsible to the holder (*z*).

By the 25 & 26 Vict. c. 89, s. 95, official liquidators appointed under that act have power to draw, accept, make or indorse bills and notes in the name and on behalf of the company.

BILLS SIGNED BY PERSONS FILLING OFFICIAL SITUATIONS.

If persons who fill official situations, as churchwardens, overseers, surveyors, commissioners, managers of joint-stock banks, agents and secretaries to companies, and the like, give bills or notes on which they describe themselves in their official capacity, they are nevertheless personally liable. Thus, drafts on a banker, signed by commissioners under an inclosure act "*as commissioners*," bind the commissioners personally (*a*). So does a promissory note given by A. and B. as churchwardens and overseers (*b*).

Bills given to them.

So it is conceived that the legal interest in a bill or note given *to* an officer by his name of office, vests in the person who happens to fill the office at the time. Thus, a note given to the manager of a joint-stock banking company vests at law in the person who fills that office when the note is given (*c*). And where a note was made payable to the trustees acting under A.'s will, parol evidence was held admissible to show who they were and what the trusts were (*d*).

(*x*) *Lindus* v. *Melrose*, *supra*. As to what is a making in the name of the company, see further, *Aggs* v. *Nicholson*, 1 H. & N. 165.

(*y*) And described as *limited*. See s. 5.

(*z*) Sect. 42; *Penrose* v. *Martyr*, 28 L. J., Q. B. 28; E., B. & E. 499, S. C. But it seems he is not liable as an acceptor of a bill drawn on the company, *Eastwood* v. *Bain*, 28 L. J., Ex. 74; 5 H. & N. 738, S. C. *Query*, whether he be liable for a false representation. (Ibid.)

(*a*) *Eaton* v. *Bell*, 5 B. & Al. 34; *Nichols* v. *Diamond*, 9 Exch. 154; *Bottomley* v. *Fisher*, 1 H. & C. 211.

(*b*) *Rew* v. *Petit*, 1 Ad. & E. 196; 3 Nev. & M. 456, S. C., nom. *Crew* v. *Petit*; *Price* v. *Taylor*, 29 L. J., Ex. 331; 5 H. & N. 540: and *vide ante*, p. 37. The personal liability of churchwardens and overseers is not transferred to their successors by the 11 & 12 Vict. c. 91. See *Chambers* v. *Jones*, 5 Exch. 229. Official liquidators under 25 & 26 Vict. c. 89, s. 95, may draw bills with the sanction of the Court.

(*c*) *Robertson* v. *Sheward*, 1 M. & Gran. 511; 1 Scott, N. R. 419, S. C.

(*d*) *Megginson* v. *Harper*, 4 Tyrwh. 96; 2 Cr. & M. 322, S. C.

CHAPTER V.

But a bill or note payable at a certain time after date to the secretary or other officer *for the time being* of a company, is void, the payee being uncertain at the time of making (*e*).

The manager, as well as any other *bonâ fide* holder, may of course sue in his own name on any bills indorsed in blank belonging to a banking company (*f*).

LOAN SOCIETIES.

And where a note was given to the treasurer of a loan society for the time being, under the 5 & 6 Will. 4, c. 28, neither the treasurer when the note was given, nor his successor in office, could maintain an action on the note, for the additional reason that the acts of Parliament, establishing loan societies, contemplated proceedings by complaint before a justice of the peace (*g*).

But now by the 3 & 4 Vict. c. 110, ss. 16 & 17, the treasurer or clerk for the time being may sue on such a note in any county court or court of conscience or request.

(*e*) *Storm* v. *Stirling*, 8 E. & B. 832; *Yates* v. *Nash*, 29 L. J., C.P. 306; 8 C. B., N. S. 581, S. C. But a promissory note to the *trustees* of a chapel or their treasurer *for the time being* was held good, for the trustees were held to be the payees and the treasurer merely an agent. *Holmes* v. *Jaques*, Law Rep., 1 Q. B. 376. See the Chapter on IRREGULAR INSTRUMENTS.

(*f*) *Law* v. *Parnell*, 30 L. J. 17; 7 C. B., N. S. 282, S. C.

(*g*) *Tims* v. *Williams*, 3 Q. B. 413. The justices must order payment forthwith, for they cannot postpone the time for payment of the note. *Parker* v. *Boughey*, 31 L. J., Mag. Ca. 272.

CHAPTER VI.

OF THE FORM OF BILLS OF EXCHANGE AND PROMISSORY NOTES.

On what Substance they may be written. . . . 75
In what Language . . 75
In Pencil or in Ink . . 75
Signature by a Mark . . 76
Of the Superscription of the Place where made . . 76
Of the Date . . . 76
Of the Superscription of the Sum payable . . . 77
Of the Time when payable . 78
Of Usance 78
Of the Request to pay . . 79
Of the Name of the Payee . 79
Of the Words "Order" or "Bearer" . . . 82
Of the Sum payable . . 82
Bills and Notes under 20s. . 83
Bills and Notes under 5l. . 83
Of the Words "Value Received" 84
Other Statement of the Consideration . . . 85
Of the Drawer's Signature . 85
Of the Direction of the Drawee 86
Of the Place where made payable by the Drawer . 87
Of the Direction to place to Account 88
Of the Words "As per Advice" 88

On what substance to be written.

BILLS of exchange and promissory notes are usually, but it is apprehended not necessarily, written on paper. It is conceived that they might be written on parchment, cloth, leather, or any other convenient substitute for paper, not being a metallic substance (*a*).

In what language.

They may be written in any language, and in any form of words.

Bills or notes may be written in pencil.

A bill or note, or any other contract, may be written in pencil, as well as in ink. "There is," says Abbott, C. J., "no authority for saying, that when the law requires a contract to be in writing, that writing must be in ink. There is not any great danger that our decision will induce individuals to adopt the mode of writing by pencil in preference to that in general use. The imperfection of this mode of writing, its liability to obliteration, and the impossibility of proving it when so obliterated, will prevent its being generally adopted" (*b*). Contracts written and signed

(*a*) See *post*, as to Metallic Tokens.

(*b*) *Geary* v. *Physic*, 5 B. & C. 234; 7 Dow. & R. 653, S. C.

CHAPTER VI.

in pencil are constantly admitted as written contracts at Nisi Prius (*c*), and testamentary writings in pencil often in the Ecclesiastical Courts (*d*).

Signature by a mark.

The signature or indorsement of negotiable instruments may be by a mark (*e*).

Superscription of the place where made.

It is proper, though not necessary, to superscribe the name of the place where the bill or note is made.

But a cheque on a banker must, unless stamped as a bill, express the place where drawn, and such place must be within fifteen miles of the banker's place of business (*f*).

The 9 Geo. 4, c. 65, prohibits the circulation of all negotiable notes or bills under 5*l*., or on which less than 5*l*. shall remain undischarged, payable to bearer on demand, and which were made, or *purport to be made*, in Scotland, or Ireland, or elsewhere, out of England, under the penalty of 20*l*., to be recovered in a summary way (*g*).

Date.

Neither is a date in general essential to the validity of a bill or note; and if there be no date, it will be considered as dated at the time it was made (*h*). And if in pleading it be stated to have been drawn on a particular day, but the declaration does not state the date appearing on the bill, that is sufficient on a motion in arrest of judgment or on demurrer (*i*).

The date expressed in the instrument is, (except when it is tendered by assignees of a bankrupt, as evidence of a petitioning creditor's debt (*j*),) *primâ facie* evidence of the time when the instrument was made (*k*).

(*c*) *Jeffery* v. *Walton*, 1 Stark. 267.

(*d*) *Rhymes* v. *Clarkson*, 1 Phil. 22; *Green* v. *Skipworth*, 1 Phil. 53; *Dickenson* v. *Dickenson*, 2 Phil. 178.

(*e*) *George* v. *Surrey*, 1 M. & M. 516.

(*f*) 55 Geo. 3, c. 184, s. 13; 9 Geo. 4, c. 49, s. 15. See the Chapter on CHECKS, and the recent statutes there referred to.

(*g*) This does not extend to drafts on bankers, see sect. 4.

(*h*) *De la Courtier* v. *Bellamy*, 2 Show. 422; *Hague* v. *French*, 3 B. & P. 173; *Giles* v. *Bourn*, 6 M. & Sel. 73; 2 Chit. R. 300, S. C. Parol evidence is admissible to show from what time an undated instrument was intended to operate. *Davis* v. *Jones*, 25 L. J., C. P. 91; 17 C. B. 625, S. C.

(*i*) Ibid.

(*j*) *Wright* v. *Lainson*, 2 M. & W. 739; 6 Dowl. 146, S. C.; see *post*.

(*k*) *Anderson* v. *Weston*, 6 Bing. N. C. 296; 8 Scott, 893, S. C.; *Taylor* v. *Kinloch*, 1 Stark. 175; *Obbard* v. *Betham*, 1 M. & M. 486; *Smith* v. *Battens*, 1 M. & Rob. 341; but see *Cowie* v. *Harris*, 1 M. & M. 141; 4 M. & P. 722, S. C.; *Rose* v. *Rowcroft*, 4 Camp. 245. And this rule applies to written documents in general. *Sinclair* v. *Baggaley*, 4 M. & W.

Formerly promissory notes, payable to bearer on demand, must not have had *printed* dates under the penalty of 50*l.* (*l*). But the statute prohibiting them is now repealed (*m*).

In general, a bill or note may be post dated (*n*). But under the old acts if this was done so as to postpone the time of payment beyond the period of two months after the making, or so as to make it in effect payable at a longer interval than sixty days after sight, and thus evade the higher scale of duty for bills at long dates, a penalty of 100*l.* was incurred (*o*), and the instrument was inadmissible in evidence (*p*).

But an unstamped bill or note issued by bankers under the provisions of 9 Geo. 4, c. 23, must not be post dated, under the penalty of 100*l.* (*q*).

All negotiable bills, notes, or drafts, for 20*s.* or any sum between 20*s.* and 5*l.*, must bear date before or at the time of issuing, under the penalty of 20*l.* (*r*).

The usual allegation that a bill or note was made on a particular day is not matter of description, and the day need not be proved as laid (*s*). It would be otherwise if the declaration went on to *describe* the instrument as bearing date on a particular day.

Misdescription of the date of a bill in an agreement is immaterial if the bill were in existence and present. For "*presentia corporis tollit errorem nominis*" (*t*).

Superscription of the sum payable.

The sum for which a bill is made is usually superscribed in figures; in a note or check, the figures are commonly subscribed.

The superscription or subscription of the sum payable is

312; *Davies* v. *Lowndes*, 7 Scott's New Rep. 213; *Potez* v. *Glossop*, 2 Exch. 195; *Harrison* v. *Clifton*, 17 L. J., Exch. 233; and the cases cited in the note to *Potez* v. *Glossop*. All the Irish Judges, in *Butler* v. *Mountgarret*, considered the point as finally settled; but in the same case, 7 H. L. Cases, 647, Lord Wensleydale expressed a doubt whether the cases above referred to had been rightly decided. The weight of authority, however, is in favour of the rule as laid down in the text, and it would be difficult to conduct investigations at *Nisi Prius*, without such a presumption.

(*l*) 55 Geo. 3, c. 184, s. 18.

(*m*) 23 & 24 Vict. c. 111, s. 19.

(*n*) *Pasmore* v. *North*, 13 East, 517. See *Austin* v. *Bunyard*, 27 L. J. 217; *Forster* v. *Mackworth*, L. R., 2 Exch. 163; 36 L. J. 94, S. C.

(*o*) 55 Geo. 3, c. 184, s. 12.

(*p*) *Field* v. *Wood*, 6 Dowl. P. C. 23; 7 Ad. & El. 114; 2 N. & P. 117, S. C.; *Serle* v. *Norton*, 9 M. & W. 809.

(*q*) Sect. 12.

(*r*) 17 Geo. 3, c. 30, revived by 7 Geo. 4, c. 6; repealed as to checks, 17 & 18 Vict. c. 83, s. 9.

(*s*) *Cowon* v. *Lyon*, 2 Camp. 307, n.; *Smith* v. *Lord*, 14 L. J., Q. B. 112; 2 D. & L. 759, S. C.

(*t*) *Way* v. *Hearne*, 32 L. J. 34.

CHAPTER VI

not necessary, if the sum be stated in the body of the note, but it will aid an omission in the body: as, where the word *fifty* was written in the body of the note, without the word *pounds* (*u*).

Time of payment.

The time of payment is regularly and usually stated in the beginning of the note or bill; but, if no time be expressed, the instrument will be payable on demand (*v*).

Negotiable bills or notes under *5l.* must formerly have been made payable within the space of twenty-one days from the date (*x*). But now there is no limitation as to the time when the bill or note is to be made payable. The bill or note may be made payable on demand, or at sight, or at any certain period after date, or after sight, or at usance. "If a bill of exchange be made payable at never so distant a day, if it be a day that must come, it is no objection to the bill" (*y*).

The expression after sight, on a bill of exchange, means after acceptance, or protest for non-acceptance, and not after a mere private exhibition to the drawee, for the sight must appear in a legal way (*z*). But if a note is made at or after sight, the expression merely imports that payment is not to be demanded till it has been again exhibited to the maker (*a*); for a note being incapable of acceptance, the word "sight" must, on a note, bear a different meaning from the same word on a bill.

Usance.

Foreign bills are commonly drawn at one, two, or more usances, or, as it is sometimes expressed, at single, double, treble, or half usance. Usance signifies the usage of the countries between which bills are drawn with respect to the time of payment. If a foreign bill be drawn, payable at sight, or at a certain period after sight, the acceptor will be

(*u*) *Elliot's case*, 2 East, P. C. 951; 1 Leach, 175, S. C.

(*v*) *Whitlock* v. *Underwood*, 3 Dowl. & R. 856; 2 B. & C. 157, S. C.; *Down* v. *Halling*, 4 B. & C. 383; 6 Dowl. & R. 455; 2 C. & P. 11, S. C.; Bayley, 5th ed. 109. But on a motion to set aside an annuity, the Court will not assume that even a Bank of England note, or a draft on a banker, are payable on demand. See the cases collected in the recent case of *Abbott* v. *Douglas*, 1 C. B. 491.

(*x*) 17 Geo. 3, c. 30, now repealed.

(*y*) Willes, C. J., in *Colehan* v. *Cooke*, Willes, 396.

(*z*) Marius, 19, cited by Lord Kenyon in *Campbell* v. *French*, 6 T. R. 212. So in America it has been held that after *sight* means after *acceptance*, and not after mere presentment. Byles on Bills, 5th American edition, p. 170.

(*a*) *Holmes* v. *Kerrison*, 2 Taunt. 323; *Sturdy* v. *Henderson*, 4 B. & Al. 592; *Sutton* v. *Toomer*, 7 B. & C. 416; 1 M. & Ry. 125, S. C.; *Dixon* v. *Nuttall*, 1 C., M. & R. 307; 6 C. & P. 320, S. C.

liable to pay according to the course of exchange at the time of acceptance, unless the drawer express that it is payable according to the course of exchange at the time it was drawn, *en espèces de ce jour* (*b*). Where half usance stands for half a month, it is fifteen days. And, in the case of all bills payable in England, month means calendar month.

The bill or note must be certainly payable at some time or other (*c*).

Request to pay.

The order to pay need be in no particular form: any expression amounting to an order (*d*), or direction, is sufficient (*e*). The word "*pay*" itself is not indispensable. Any synonymous or equivalent expression will suffice, as "*Credit in Cash*" (*f*).

Description of the payee.

The payee should be particularly described, so that he cannot be confounded with another person of the same name, and must be a person who is capable of being ascertained at the time the instrument is made (*g*). It is sufficient that the payee be so designated, though he be not named (*h*). But if the bill get into the hands of a wrong payee, unless it be payable to bearer, he can neither acquire nor convey a title. One Christian drew a bill on the defendant, in London, payable to Henry Davis. The bill got in the hands of another Henry Davis than the one in whose favour it was drawn, was accepted by the defendant, and by the wrong Henry Davis was indorsed to the plaintiff. Held, that the indorsement of his own name by Henry Davis was, under these circumstances, a forgery, and (*dissentiente* Lord

(*b*) Poth. 174.

(*c*) *Vide post.* Irregular Instruments.

(*d*) *Hamilton* v. *Spottiswood*, 4 Exch. 200.

(*e*) Beawes, 3; Marius, 11. In France, *il vous plaira payer*, is the common language of a bill. *Morris* v. *Lee*, 2 Ld. Raym. 1397; 1 Stra. 629, S. C. *Quære*, whether a mere written request, without any words of demand, amount to a bill. Lord Kenyon held this instrument to be a bill:—"Mr. Nelson will much oblige Mr. Webb, by paying to J. Ruff, or order, twenty guineas on his account." *Ruff* v. *Webb*, 1 Esp. 129. But Lord Tenterden held the following instrument not to be a bill:—"Mr. Little, *please to let the bearer have* seven pounds, and place it to my account, and you will oblige your humble servant, R. SLACKFORD." *Little* v. *Slackford*, 1 M. & M. 171. "The paper," says his Lordship, "does not purport to be a demand made by a party having a right to call on the other to pay. The fair meaning is, 'you will oblige me by doing it.'" But see *Russell* v. *Powell*, 14 M. & W. 418.

(*f*) *Ellison* v. *Collingridge*, 9 C. B. 570.

(*g*) *Yates* v. *Nash*, 29 L. J., C. P. 306; 8 C. B., N. S. 581.

(*h*) *Storm* v. *Stirling*, 3 E. & B. 832; *Cowie* v. *Stirling*, 6 E. & B. 333.

CHAPTER VI.

Kenyon) could convey no title to the plaintiff (*i*). If the name be spelt wrong, parol evidence is admissible to show who was intended (*k*). If there be father and son of the same name, it will be intended payable to the father till the contrary appear (*l*). But if the son be found in possession of the note, and he indorse, that is evidence that he, and not the father, is payee (*m*). A note payable to A., or to B. & C., or his or their order, is not a promissory note, within the statute (*n*). A note in this form—"15*l.* 5*s.* balance due to A. C., I am still indebted, and do promise to pay" (*o*). Or in this—"Received of A. B. 100*l.*, which I promise to pay on demand, with lawful interest," sufficiently designates the payee (*p*). A note payable "to the trustees acting under A.'s will" is a good note, and parol evidence is admissible, to show who the trustees are, and what are the trusts (*q*). A note was made payable to the manager of the National Provincial Bank of England. To an action by the payee in his own name, the defendant pleaded that he did not make the note. Held, that, under this plea, the plaintiff was entitled to recover (*r*). "On demand I promise to pay J. W., T. S. and D. M., or to their order, or the major part of them, 100*l.*" is a promissory note upon which the three persons mentioned can jointly maintain an action (*s*).

If the bill be not made payable, either to any payee in particular, or to the drawer's order, or to bearer in general, it would seem, according to the opinion of the majority of the Judges (*t*), to be payable to bearer; but, according to the opinion of Eyre, C. B., in the same case, it is mere waste paper (*u*). If drawn payable to a fictitious payee, and the drawer indorse the fictitious payee's name, the holder cannot, either as indorsee or bearer, recover against the acceptor (*x*); but if the holder's money has got into the acceptor's hands,

(*i*) *Mead* v. *Young*, 4 T. R. 28.

(*k*) *Willis* v. *Barrett*, 2 Stark. 29.

(*l*) *Sweeting* v. *Fowler*, 1 Stark. 106; *Wilson* v. *Stubs*, Hobart, 330; see Bro. Ab. Addition, 18, 34, 43, 9 to 6; 13 Dyer, 5.

(*m*) *Stebbing* v. *Spicer*, 19 L. J., C. P. 24; 8 C. B. 827, S. C.

(*n*) *Blanckenhagen* v. *Blundell*, 2 B. & Al. 417.

(*o*) *Chadwick* v. *Allen*, 1 Stra. 706.

(*p*) *Green* v. *Davies*, 4 B. & C. 235; 6 D. & R. 306, S. C.

(*q*) *Megginson* v. *Harper*, Tyr. 96; 2 C. & M. 322, S. C.

(*r*) *Robertson* v. *Sheward*, 1 M. & G. 511; 1 Scott, N. R. 419, S. C.

(*s*) *Watson* v. *Evans*, 32 L. J., Exch. 137; 1 Hurl. & Colt. 662, S. C.

(*t*) *Minet* v. *Gibson*, 1 H. Bl. 608.

(*u*) In *Rex* v. *Randall*, Russ. C. C. 185, a bill payable to ——, or order, was held not to be a bill of exchange; because there was no payee; and see *Rex* v. *Richards*, 1 R. & R. C. C. 193.

(*x*) *Bennett* v. *Farnell*, 1 Camp. 130.

the holder may recover it as money had and received. If the acceptor, at the time of acceptance, *knew* the payee to be a fictitious person, he shall not take advantage of his own fraud; but a *bonâ fide* holder may recover against him on the bill, and declare on it as payable to bearer, or may recover on the money counts (*y*). So the holder may recover against an acceptor for the honour of the drawer where the payee is a fictitious person and treat the bill as payable to bearer (*z*).

If a blank be left for the payee's name, a *bonâ fide* holder may fill it up with his own name, and recover against the

(*y*) *Minet* v. *Gibson*, 3 T. R. 481; judgment affirmed in Parliament, 1 H. Bl. 569; and see *Vere* v. *Lewis*, 3 T. R. 182; *Collis* v. *Emett*, 1 H. Bl. 313; *Tatlock* v. *Harris*, 3 T. R. 174. To *Bennett* v. *Furnell*, 1 Camp. 130, the learned reporter appends the following note:—"Almost all the modern cases upon this question arose out of the bankruptcy of Livesay & Co., and Gibson & Co., who negotiated bills, with fictitious names upon them, to the amount of nearly *a million sterling a year*. The first case was *Tatlock* v. *Harris*, 3 T. R. 174, in which the Court of K. B. held, that the *bonâ fide* holder for a valuable consideration of a bill drawn payable to a fictitious person, and indorsed in that name by the drawer, might recover the amount of it in an action against the acceptor, for money paid or money had and received, upon the idea, that there was an appropriation of so much money to be paid to the person who should become the holder of the bill. In *Vere* v. *Lewis*, 3 T. R. 182, decided the same day, the Court held, there was no occasion to prove that the defendant had received any value for the bill, as the mere circumstance of his acceptance was sufficient evidence of this; and three of the Judges *thought* the plaintiff might recover on a count which stated that the bill was drawn payable to *bearer*. *Minet* v. *Gibson*, 3 T. R. 481, put this point directly in issue, and the unanimous opinion of the Court was, that where the circumstance of the payee being a fictitious person is known to the acceptor, the bill is in effect payable to bearer. Soon after the Court of C. P. laid down the same doctrine in *Collis* v. *Emett*, 1 H. Bl. 313. This decision was acquiesced in; but *Minet* v. *Gibson* was carried up to the House of Lords, 1 H. Bl. 569. The opinion of the Judges being then taken, Eyre, C. B. (p. 618), and Heath, J. (p. 619), were for reversing the judgment of the Court below, and Lord Thurlow, C., coincided with them (p. 625), but the other Judges thinking otherwise, judgment was affirmed. Parl. Cas. 8vo. ii. 48. The last case upon the subject reported is *Gibson* v. *Hunter*, 2 H. Bl. 187, 288, which came before the House of Peers upon a demurrer to evidence, and in which it was held, that in an action on a bill of this sort against the acceptor to show that he was aware of the payee being fictitious, evidence is admissible of the circumstances under which he had accepted other bills payable to fictitious persons. *Vide Tuft's case*, Leach, Cro. Law, 159." *Phillips* v. *Im Thurn*, 18 C. B., N. S. 694.

(*z*) *Phillips* v. *Im Thurn*, 18 C. B., N. S. 694; and see *Phillips* v. *Im Thurn*, L. R., 1 C. P. 463; 35 L. J. 220, S. C.

CHAPTER VI.

drawer (*a*). But, in order thus to charge the acceptor, the holder must show that he had authority from the drawer to insert his own name as payee (*b*).

If the name of the payee do not purport to be the name of any *person*, as where a note was made payable to Ship Fortune or bearer, it is a note payable to bearer simply (*c*).

The words "order" or "bearer."

Unless a bill or note be payable to *order* or to *bearer*, it is not negotiable, though still a valid security as between the original parties (*d*); but, if it be, notwithstanding, assigned by the payee, he is chargeable at the suit of an indorsee (*e*).

A bill or note may be made payable to A. B. or order, or to A. B. or bearer (*f*), or to the drawer's own order (*g*), or to bearer generally.

If made payable to order, it is assignable by indorsement; if made payable to bearer, it is assignable by mere delivery.

Sum payable.

The sum for which a bill is made payable is usually written in the body of the bill in words at length, the better to prevent alteration; and, if there be any difference between the sum in the body and the sum superscribed, the sum mentioned in the body will be taken to be that for which the bill is made payable (*h*); when the figures express a larger sum than the words, evidence to show that the difference arose from an accidental omission of words, is inadmissible (*i*). We have already seen, that an omission in the body will be aided by the superscription (*k*).

An inaccurate, but intelligible, statement of the sum payable will not vitiate. Thus, an order, or promise to pay so many "pound," instead of "pounds," is a good bill or

(*a*) *Crutchley* v. *Clarence*, 2 M. & Sel. 90; *Attwood* v. *Griffin*, R. & M. 425; 2 C. & P. 368, S. C.

(*b*) *Crutchley* v. *Mann*, 5 Taunt. 529; 1 Marsh. 29, S. C. And see *Awde* v. *Dixon*, 6 Exch. 869.

(*c*) *Grant* v. *Vaughan*, 3 Burr. 1516.

(*d*) *Smith* v. *Kendall*, 6 T. R. 123; 1 Esp. 231, S. C.; *Rex* v. *Box*, 6 Taunt. 325; Russ. & Ry. 300, S. C. See post, Chapter on TRANSFER.

(*e*) *Hill* v. *Lewis*, 1 Salk. 133. See further on this subject the Chapter on TRANSFER.

(*f*) As to bills payable to bearer on demand, see the last Chapter.

(*g*) Drawn payable to the drawer's order, it is payable to himself. *Smith* v. *M'Clure*, 5 East, 476; 2 Smith, 443, S. C. So also held in America. Byles on Bills, 4th American edition.

(*h*) Marius, 138; Beawes, 193; *Saunderson* v. *Piper*, 5 Bing. N. C. 425; 7 Scott, 408, S. C.

(*i*) *Saunderson* v. *Piper*, 5 Bing. N. C. 425; 7 Scott, 408, S. C.

(*k*) *Elliot's case*, 2 East, P. C. 951; 1 Leach, 175, S. C.

note (*l*). A bill for "twenty-five, seventeen shillings and three," is a bill for 25*l.* 17*s.* 3*d.* (*m*). The word *sterling* means sterling in that part of the United Kingdom where the bill is payable (*n*).

Negotiable bills and notes under 20*s.*

All negotiable bills, notes or drafts for any sum under 20*s.*, were made void by 48 Geo. 3, c. 88, s. 2; and the third section imposed on the utterers and negotiators of such notes, bills, or drafts, a penalty of 5*l.* to 20*l.*, at the discretion of a magistrate, to be recovered in a summary way.

Negotiable bills and notes under 5*l.*

Negotiable bills and notes for more than 20*s.* and less than 5*l.*, (except checks on bankers) (*o*), were also formerly void, unless they specified the name and abode of the payee, were attested by a subscribing witness, bore date at or before the time of issue, and were made payable within twenty-one days after date, but not to bearer on demand. And such an instrument could not be negotiated after the time limited for its payment (*p*).

The 17 Geo. 3, c. 30, was repealed by the 3 Geo. 4, c. 70, but was revived by the 7 Geo. 4, c. 6, s. 1. The latter act provided, however, that nothing therein contained should extend to any draft drawn by a man on his own banker for money held by that banker to the use of the drawer. By s. 3 of the same act, a penalty of 20*l.* is imposed on issuing any promissory note payable to bearer on demand for less than 5*l.*

The 9 Geo. 4, c. 65, s. 1, prohibits the circulation of all negotiable notes or bills under 5*l.*, or on which less than 5*l.* shall remain undischarged, payable to bearer on demand, and which were made, or *purport to be made*, in Scotland, or Ireland, or elsewhere, out of England, under the penalty of 20*l.*, to be recovered in a summary way. By s. 4, these provisions do not extend to drafts on bankers.

By the 23 & 24 Vict. c. 111, s. 19, drafts for less than 20*s.*, drawn by a man on his own banker for money held by the banker to or for the use of the drawer, are exempted from the above restrictions.

And, lastly, by the 26 & 27 Vict. c. 105, the 17 Geo. 3, c. 30, is temporarily (*i. e.* for three years and one session, now prolonged by 31 & 32 Vict. c. 111, till 28th July, 1869,

(*l*) *Rex* v. *Port*, Bayley, 12, 6th ed.

(*m*) *Phipps* v. *Tanner*, 5 C. & P. 488.

(*n*) *Taylor* v. *Booth*, 1 C. & P. 286.

(*o*) 7 Geo. 4, c. 6, s. 9, and 17 & 18 Vict. c. 83, s. 9; and see ante, Chapter on CHECKS.

(*p*) 17 Geo. 3, c. 30; 7 Geo. 4, c. 6; 9 Geo. 4, c. 65, s. 1; 17 & 18 Vict. c. 83, s. 9.

CHAPTER VI.

and one session of parliament), repealed *in toto*, and so much of any other act as prohibits or imposes any penalty with respect to bills or notes under 5*l*., except promissory notes payable to bearer on demand. As to the latter, therefore, the 48 Geo. 3, c. 88, s. 2, the 7 Geo. 4, c. 6, s. 3, and the 9 Geo. 4, c. 65, s. 1, are still in force.

Until the act of 3 & 4 Will. 4, c. 83, s. 2, no bills or notes for any sum under 50*l*. could be issued or made payable to any corporation or co-partnership consisting of more than six members, within sixty-five miles of London (*q*).

Value received.

There are some old cases tending to show that the words *value received* are an essential part of a bill (*r*), but it is now well settled that they are not at all material (*s*).

It has been indeed laid down (*t*), that "to entitle the holder of an inland bill or note for the payment of 20*l*. or upwards, to recover interest and damages against the drawer and indorser, in default of acceptance or payment, it shall contain the words "value received" (*u*). But it is conceived that this opinion is unfounded. It seems to rest on the assumption that a protest is necessary for this purpose, and that the statutes of Will. 3 and Anne do not authorize or direct a protest, except the bill be expressed to be made for value received. But it has been decided that the 8th section of 3 & 4 Anne, c. 9, makes a protest unnecessary for this purpose (*x*); and, even if it were necessary under those statutes, in bills where those words are expressed, it would not be necessary where they are not; for, upon a careful perusal of both statutes, it will appear that they only apply to bills expressed to be for value received; and the 6th section of the 3 & 4 Anne distinctly declares, that a protest shall not be necessary, unless the words "value received" appear on the face of the bill; thus, leaving bills where these words are not as at common law: and at common law no inland bill need be protested, in order to charge the drawer with interest and damages (*y*). For this purpose, therefore, (if the statutes made any difference), a bill would be more readily effectual without these words than with them.

It has been questioned whether an action of *debt* will lie

(*q*) 7 Geo. 4, c. 46, s. 2. See now the 7 & 8 Vict. c. 32.

(*r*) *Cramlington* v. *Evans*, 1 Show. 5; Vin. Ab. Bills of Exch. G. 2.

(*s*) *White* v. *Ledwich*, Bayley, 40, 6th ed.; 4 Doug. 427, S. C.; *Grant* v. *Da Costa*, 3 M. & S. 351; and see *Popplewell* v. *Wilson*, 1 Stra. 264, and infra, note.

(*t*) Chitty, 67.

(*u*) 9 & 10 Will. 3, c. 17; 3 & 4 Anne, c. 9, s. 4.

(*x*) *Windle* v. *Andrews*, 2 B. & Al. 696; 2 Stark. 425, S. C.

(*y*) Per Bayley, J., 2 B. & A. 701.

on a bill, unless the consideration be expressed (*z*). But it is now decided that debt will lie although the consideration be not expressed (*a*).

The words "*value received*" are ambiguous, where the bill is drawn payable to a third person; for they may mean either value received, by the drawer, of the payee, or by the acceptor of the drawer. But the first is the more probable interpretation; for it is more natural "that the party who draws the bill should inform the drawee of a fact which he does not know, than of one of which he must be well aware" (*b*).

If, however, the bill is drawn payable to the drawer's own order, the words "value received" must mean received by the acceptor of the drawer; and on such a bill, if the declaration state that it was for value received by the drawer it will be a variance (*c*). "*Value received*," in a note, means received by the maker of the payee (*d*).

Other statements of the consideration.

Though the nature or particulars of the consideration appear on the bill or note, it is not necessary to state it in the declaration, or it may be stated generally as value received (*e*). "The defendant," says Maule, J., "may prove that the note was given for a different consideration, or without any consideration at all" (*f*).

But it has been held that the defendant will not be allowed to contradict his written admission on the note, of the nature of the consideration. Where a note was given by an administratrix, and expressed to be "for value received by my late husband," she was not allowed to show that the note was given only as an indemnity, and that the payee had not been damnified (*g*).

Signature of the drawer.

Without the drawer's signature, a bill payable "to my

(*z*) *Bishop* v. *Young*, 2 B. & P. 78; *Priddy* v. *Henbry*, 3 D. & R. 165; 1 B. & C. 674, S. C.

(*a*) *Hatch* v. *Trays; Watson* v. *Kightly*, 11 Ad. & E. 702; 3 Per. & Dav. 408, S. C.

(*b*) Per Lord Ellenborough, in *Grant* v. *Da Costa*, 3 M. & Sel. 351.

(*c*) *Highmore* v. *Primrose*, 5 M. & S. 65.

(*d*) *Clayton* v. *Gosling*, 5 B. & C. 361; 8 D. & R. 110.

(*e*) *Coombs* v. *Ingram*, 4 D. & R. 211; *Bond* v. *Stockdale*, 7 D. & R. 140.

(*f*) *Abbott* v. *Hendrich*, 1 M. G. 796; 2 Scott, N. R. 183, S. C. Where the note on the face of it purported to be given for "value received in Pennance shares pursuant to annexed contract," it was held unnecessary to put in any contract. *Fox* v. *Frith*, Car. & M. 502.

(*g*) *Ridout* v. *Bristow*, 1 C. & J. 231; 1 Tyr. 84, S. C.; and see *Edwards* v. *Jones*, 2 M. & W. 414; 5 Dowl. 585; 7 C. & P. 633, S. C.

CHAPTER VI.

order," though accepted, is of no force (*h*), either as a bill of exchange or as a promissory note (*i*).

The signature of the drawer or maker of a bill or note is usually subscribed in the right-hand corner; but it is sufficient if written in any other part. Thus "I, J. S., promise to pay," has been held a sufficient signature of a promissory note (*j*). A man who cannot write may sign a bill by his mark (*k*).

An allegation in pleading that a party *made* his bill or note is sufficient, without alleging that he *signed* it, for *making* implies *signing* (*l*).

If a deed be first executed, and then written or filled up, the deed is void (*m*); but it is otherwise with a bill of exchange. For, if a stamped paper be signed, leaving blanks for the date, sum, time when payable, and name of the drawee, the drawer will be chargeable for any sum afterwards inserted within the amount warranted by the stamp. It is a letter of credit for an indefinite but not unlimited sum (*n*).

Direction to the drawee.

A bill of exchange, being in its original a letter, should be properly addressed to the drawee (*o*). But where a bill was made payable "at No. 1, Wilmot Street, opposite the Lamb, Bethnal Green, London," without mentioning the drawee's name, and the defendant accepted it, he was not allowed to make the objection (*p*). But a bill cannot be addressed to one man and accepted by another (*q*). A bill directed to A., or in his absence to B., being accepted by A., may be declared on without taking notice of B. (*r*). If the word *at* precede the drawee's name, whether inserted ignorantly or fraudulently, the instrument is still a bill of

(*h*) *Stoessiger* v. *South E. Railway Company*, 3 E. & B. 558; *Goldsmid* v. *Hampton*, 27 L. J., C. P. 286; 5 C. B., N. S. 94, S. C.

(*i*) *M'Call* v. *Taylor*, 34 L. J., C. P. 365.

(*j*) *Taylor* v. *Dobbins*, 1 Stra. 399; *Saunderson* v. *Jackson*, 2 B. & P. 238.

(*k*) *George* v. *Surry*, 1 M. & M. 516.

(*l*) *Elliott* v. *Cowper*, 1 Stra. 609; 2 Ld. Raym. 1376, S. C.; 8 Mod. 307; *Erskine* v. *Murray*, 2 Lord Raym. 1542; 1 Barn. 88, S. C.

(*m*) Com. Dig. Fait. (A.) 1.

(*n*) *Collis* v. *Emett*, 1 H. Bl. 313; *Russell* v. *Langstaffe*, 2 Doug. 496; *Snaith* v. *Mingay*, 1 M. & S. 87; *Leslie* v. *Hastings*, 1 M. & R. 119; *Molloy* v. *Delves*, 7 Bing. 428; 5 M. & P. 275; 4 C. & P. 492, S. C.; *Barker* v. *Sterne*, 9 Exch. 684.

(*o*) *Peto* v. *Reynolds*, 9 Exch. 410; 11 Exch. 418, in error, S. C.

(*p*) *Gray* v. *Milner*, 8 Taunt. 739; 3 Moore, 90, S. C.

(*q*) *Davis* v. *Clarke*, 13 L. J., Q. B. 305; 6 Q. B. 16, S. C.

(*r*) *Anon*, 12 Mod. 447.

exchange (*s*). A bill may be directed to the drawer himself though it is, in that case, rather a note than a bill (*t*).

Of the place where made payable by the drawer.

If the drawer intends that the bill should be payable at a particular place, he may insert such a direction. Without the words "only and not elsewhere," appended to such direction, the acceptance will be general, within 1 & 2 Geo. 4, c. 78 (*u*), so as to charge the *acceptor*. The drawer himself cannot be charged, unless the bill have been presented at the place where the drawer himself made it payable (*x*). This statute does not apply to promissory notes; and therefore, if any place of payment be mentioned in the body of a note, it is part of the contract. The place of payment must be described in the declaration, and a presentment there is essential, in order to charge the maker or any other party (*y*). But, where the place of payment is merely stated in a memorandum at the foot or in the margin of the note, by way of direction, it need not be noticed in pleading, and presentment there, though it is sufficient (*z*), is not essential (*a*).

But where the whole note was printed (except the names, dates, and sum), and a place of payment was also printed at the bottom of the note, Lord Ellenborough held that a special presentment at this particular place was necessary (*b*). If the drawer of a bill makes it payable at his own house, that circumstance is evidence of its being an accommodation bill (*c*).

The 7 Geo. 4, c. 6, s. 10 enacts, that every promissory note under 20*l*., payable to bearer on demand, must be made payable at the place where issued, but may be made payable at other places also.

(*s*) *Shuttleworth* v. *Stephens*, 1 Camp. 407; *Rex* v. *Hunter*, R. & R. C. C. 511; *Allan* v. *Mawson*, 4 Camp. 115.

(*t*) *Block* v. *Bell*, 1 M. & Rob. 149; *Starke* v. *Cheesman*, Carth. 509; *Dehers* v. *Harriot*, 1 Show. 163; *Robinson* v. *Bland*, 2 Burr. 1077; *Jocelyn* v. *Laserre*, Fort. 282; see *Davis* v. *Clarke*, 6 Q. B. 16. Byles on Bills, 3rd American edition, p. 145.

(*u*) *Selby* v. *Eden*, 3 Bing. 611; 11 Moore, 511, S. C.; *Fayle* v. *Bird*, 6 B. & C. 531; 9 Dowl. & R. 639.

(*x*) *Gibbs* v. *Mather*, in error, 8 Bing. 214; 1 M. & Scott, 387, S. C.; 2 C. & J. 254, S. C.; *Hodge* v. *Fillis*, 3 Camp. 463.

(*y*) *Sanderson* v. *Bowes*, 14 East, 500; *Roche* v. *Campbell*, 3 Camp. 247.

(*z*) *Fife* v. *Round*, 1861.

(*a*) *Price* v. *Mitchell*, 4 Camp. 200; *Exon* v. *Russell*, 4 M. & S. 506; *Williams* v. *Waring*, 10 B. & C. 2; 5 M. & R. 9, S. C. But in *Hardy* v. *Woodroffe*, 2 Stark. 319, and in *Sproule* v. *Legg*, 3 Stark. 156, Lord Tenterden held that the note might be described as made payable at a place mentioned in the memorandum only.

(*b*) *Trecothick* v. *Edwin*, 1 Stark. 468.

(*c*) *Sharp* v. *Bailey*, 8 B. & C. 44; 4 M. & R. 4, S. C.

CHAPTER VI.

Bills or notes drawn by co-partnerships or corporations of more than six persons must, by 7 Geo. 4, c. 46, specify the place of payment, and that place must not be in London, or within sixty-five miles thereof, unless in case of a bill for *50l.* and upwards, drawn payable at some period after date or sight (*d*). But this restriction, as to making the bills payable in London, is now removed by 3 & 4 Will. 4, c. 83, s. 2. And the restriction is further relaxed by 7 & 8 Vict. c. 32, s. 26.

Notes of the branches of the Bank of England are payable at the Bank in London; but none of their notes are payable at a branch bank, unless specially made payable at such branch (*e*).

Direction to place to account.

The direction to place to account is unnecessary (*f*).

Words "as per advice."

A bill is sometimes directed to be paid "*as per advice;*" sometimes "*without further advice;*" sometimes "*with or without further advice;*" and sometimes, and more commonly, without any of these words. In the first case, it is said the drawee is not justified in paying without further advice (*g*).

(*d*) 7 Geo. 4, c. 46, s. 1.

(*e*) 3 & 4 Will. 4, c. 98, s. 6, which they must now be; see p. 64.

(*f*) *Laing* v. *Barclay*, 1 B. & C. 398; 2 D. & R. 530, S. C.

(*g*) Chitty, 162, 9th ed.

CHAPTER VII.

OF AMBIGUOUS, CONDITIONAL (*a*), AND OTHERWISE IRREGULAR INSTRUMENTS.

Note payable to the Maker . 89
Equivocal Instruments . 89
Bills and Notes must be for Payment of a Sum of Money and for that only . 91
And for Money in specie . 91
And for a Sum certain . 92
And for Payment of it . 92
Must not suspend Payment on a Condition. . . 92
Period of Payment may be uncertain if inevitable . 94
Where several Makers or several Payees are respectively liable or entitled in the alternative . . . 94
Must not be made payable out of a particular Fund . 95
Irregular Bill or Note may be an Agreement . . 95
Letters of Credit and Circular Notes . . . 95

Note payable to the maker.

A NOTE cannot of course be made by a man to himself without more. Neither can it be made to himself and another man (*b*).

But a note made payable to the maker's order becomes, in legal effect, when indorsed in blank, a note payable to bearer (*c*); and when specially indorsed, a note payable to the indorsee's order (*d*).

Ambiguous instruments.

If an instrument be made in terms so ambiguous that it is doubtful whether it be a bill of exchange or a promissory note, the holder may treat it as either, at his election (*e*).

(*a*) As to the contracting words in promissory notes, see Chapter II.

(*b*) See *Moffatt* v. *Van Millingen*, 2 B. & P. 124, n.; *Mainwaring* v. *Newman*, ibid. 120; and see *Teague* v. *Hubbard*, 8 B. & C. 345. It was formerly a doubt whether a note promising to pay to the maker's order, or to the maker or order, be a note within the statute. Such a note was sued on in *Richards* v. *Macey*, 14 M. & W. 484. It should on principle seem, when indorsed by the maker in blank, to be in legal effect a note payable to bearer. So decided by the Court of C. P. since these observations were written. *Browne* v. *De Winton*, 17 L. J., C. P. 281; 6 C. B. 336, S. C.; see ante, Chapter IV.

(*c*) *Browne* v. *De Winton*, 17 L. J., C. P. 280; 6 C. B. 336, S. C.

(*d*) *Gay* v. *Lander*, 17 L. J., C. P. 287; 6 C. B. 336, S. C.

(*e*) *Peto* v. *Reynolds*, 9 Exch. 410; *Armfield* v. *Allport*, 27 L. J., Exch. 42; *Fielder* v. *Marshall*, 30 L. J., C. P. 158; 9 C. B. (N. S.) 606, S. C.; and a Court of law, in

CHAPTER VII.

Thus, where for goods sold and delivered, the defendant gave the plaintiff an instrument in the following form :—

£44 : 11*s.* 5*d.*

London, 5th August, 1833.

Three months after date I promise to pay Mr. John Bury, or order, forty-four pounds eleven shillings and five pence, value received.

J. B. GRUTHEROT, JOHN BURY.
35, Montague Place,
Bedford Place.

And Grutherot's name was written across the instrument as an acceptance, and Bury's name on the back as an indorsement, it was held that the plaintiff might treat the defendant Bury either as a drawer of a bill or maker of a note, and therefore was not bound to give him notice of dishonour (*f*).

So where an instrument was in the following form :—

21*st October*, 1804.

Two months after date pay to the order of John Jenkins, £78 : 11*s.*, value received.

THOMAS STEPHENS.

At Messrs. JOHN MORSON & Co.

Lord Ellenborough held that it was properly a bill of exchange, but that perhaps it might have been treated as a promissory note, at the option of the holder (*g*).

A man may draw a bill on himself (*h*), and of that opinion were all the Judges of the C. P. (*i*). Perhaps such a bill would be good where the drawer draws on himself *payable*

furtherance of justice and the intentions of the parties, will be astute to put such a construction upon it, *ut res magis valeat*. But still, if it be a mere inchoate instrument, it is neither a bill of exchange nor a promissory note. See *M'Call* v. *Taylor*, 34 L. J. 365, and the preceding Chapter.

(*f*) *Edis* v. *Bury*, 6 B. & C. 433; 9 D. & R. 492; see *Edwards* v. *Dick*, 4 B. & Ald. 212; *Block* v. *Bell*, 1 M. & Rob. 149; see *Dickenson* v. *Teague*, 4 Tyrwh. 450; 1 C., M. & R. 241, S. C.; *Lloyd* v. *Oliver*, 18 Q. B. 471.

(*g*) *Shuttleworth* v. *Stephens*, 1 Camp. 407; *Allan* v. *Mawson*, 4 Camp. 115; *Gray* v. *Milner*, 8 Taunt. 739; 3 B. Moore, 90, S. C.; *Rex* v. *Hunter*, R. & R. C. C. 511; *Armfield* v. *Allport*, 27 L. J., Exch. 42.

(*h*) *Starke* v. *Cheesman*, Carthew, 508; *Dehers* v. *Harriot*, 1 Show. 163; *Robinson* v. *Bland*, 2 Burr. 1077.

(*i*) *Magor* v. *Hammond*, C. P., cited by Bayley, J., 9 B. & C. 864; and see *Roach* v. *Ostler*, 1 Man. & R. 120; Byles on Bills, 5th American edition, p. 185.

to his own order (*k*); and a bill is sometimes drawn payable to the drawee's order. It is conceived, that in the latter case, as well as the former, the instrument might, when accepted, be declared on as a promissory note of the drawee. But a bill payable to the drawee's order, is clearly not a bill of exchange (*l*).

If a man draw a bill upon himself, it may be treated by the holder as a note (*m*). So may a bill drawn by a banking company in one place, on the same banking company in another place (*n*).

An instrument which directs the drawee to pay *without acceptance*, is nevertheless a bill of exchange (*o*).

A note written by the creditor to his debtor at the foot of the creditor's account, requesting the debtor to pay that account to the creditor's agent, has been held not a bill of exchange, nor an order for the payment of money within the Stamp Act (*p*).

Bills and notes must be for payment of money only.

Bills and notes must be for payment of money and the performance of some other act. Therefore (*q*), a note to deliver up horses and a wharf, and pay money at a particular day, was held no promissory note. Nor must a bill or note be in the alternative, as to pay a sum of money, or render A. B. to prison (*r*).

And for money *in specie*.

And it must be for money *in specie*; therefore, a promise to pay in three good East India bonds (*s*), or in cash, or Bank of England notes (*t*), is not a promissory note.

(*k*) 1 Pardessus, 351.

(*l*) *Reg.* v. *Bartlett*, 2 M. & Rob. 362. See *Peto* v. *Reynolds*, 9 Exch. 410.

(*m*) *Roach* v. *Ostler*, 1 M. & R. 120.

(*n*) *Miller* v. *Thompson*, 3 M. & G. 576.

(*o*) *Reg.* v. *Kinnear*, 2 M. & Rob. 117; *Miller* v. *Thomson*, 3 M. & G. 576.

(*p*) *Norris* v. *Solomon*, 2 M. & Rob. 266. But in America it has been held that an indorsement on a bond or promissory note ordering the contents to be paid to order, is a good bill of exchange. Byles on Bills, 5th American edition, p. 184.

(*q*) *Martin* v. *Chauntry*, 2 Stra. 1271; *Moore* v. *Vanlute*, B. N. P. 272, 5th ed.; *Follett* v. *Moore*, 19 L. J., Exch. 6; 4 Exch. 410, S. C. In this case a note, agreeing also to give real security, was held void as a note. But a note reciting, that real security *had been given*, is a good note, and requires only a note stamp. *Fancourt* v. *Thorne*, 9 Q. B. 312. See ante, Chapter IV. An instrument in this form, "I promise to pay C. A. D. or bearer on demand the sum of 16*l.* at sight, by giving up clothes and papers, &c.," was held a good promissory note, it being considered, that the latter words imported the consideration already received by the maker. *Dixon* v. *Nuttall*, 1 C., M. & R. 307; 6 C. & P. 320, S. C.

(*r*) *Smith* v. *Boheme*, Gilb. Ca. L. & E. 93, cited Lord Raym. 1396.

(*s*) Bul. N. P. 272.

(*t*) Bayley, 11, 6th ed.; *Ex*

CHAPTER VII.

And for a sum certain.

And the sum must be certain, not susceptible of contingent or indefinite additions. Therefore, where an instrument promised to pay J. S. the sum of 65*l.*, with lawful interest for the same, and all other sums which should be due to him, Lord Ellenborough held that it was not a promissory note, even for the sixty-five pounds (*u*). Nor must the sum payable be subject to indefinite or contingent deductions. Thus, where the defendant promised to pay 400*l.* to the representatives of J. S., first deducting thereout any interest or money J. S. might owe to the defendant, it was held no promissory note (*x*).

And for the *payment* of money.

And for the *payment* of money. Where the instrument contains a stipulation, that the money or a portion of it shall be paid by a set-off, it is no promissory note (*y*).

Must not suspend payment on a condition.

The order or promise must be to pay absolutely and at all events; and payment must not depend upon a contingency; for, as observed by Lord Kenyon (*z*), "It would perplex commercial transactions, if paper securities of this kind were issued into the world, incumbered with conditions and contingencies, and if the persons to whom they were offered in negociation were obliged to inquire when these uncertain events would probably be reduced to a certainty." Besides, the recognition of conditional promissory notes would make a variety of conditional promises in writing valid, without evidence of consideration, and thus materially infringe on an established and very salutary rule of law (*a*). Thus, a note to this effect, "We promise to pay A. B. 116*l.* 11*s.* value received, on the death of George Henshaw, provided he leaves either of us sufficient to pay that said sum, or if we otherwise shall be able to pay it," is not a promissory note within the statute (*b*). So, a written engagement to pay a certain sum so many days after the defendant's marriage, is no promissory note, for, possibly, he never may marry (*c*). So, a paper, whereby the defendants promised

parte Imeon, 2 Rose, 225; but see 3 & 4 Will. 4, c. 98, s. 6; and Byles on Bills, 5th American edition.

(*u*) *Smith* v. *Nightingale*, 2 Stark. 375; *Bolton* v. *Dugdale*, 4 B. & Ad. 619; 1 N. & M. 412, S. C.

(*x*) *Smith* v. *Nightingale*, 2 Stark. 375; *Barlow* v. *Broadhurst*, 4 B. Moore, 471; and see *Leeds* v. *Lancashire*, 2 Camp. 205; *Bolton* v. *Dugdale*, 4 B. & Ad. 619; 1 N. & M. 412, S. C.; 2 Bligh, 79; *Ayrey* v. *Fearnsides*, 4 M. & W. 168.

(*y*) *Davies* v. *Wilkinson*, 10 A. & E. 98; 2 P. & D. 256, S. C.

(*z*) *Carlos* v. *Fancourt*, 5 T. R. 482.

(*a*) See *Pearson* v. *Garrett*, 4 Mod. 242.

(*b*) *Roberts* v. *Peake*, 1 Burr. 323; *Leeds* v. *Lancashire*, 2 Camp. 205.

(*c*) *Beardsley* v. *Baldwin*, 2 Stra. 1151; and see *Pearson* v.

to pay the plaintiffs, or order, the sum of 13*l.*, for value received, with interest at 5*l.* per cent., "and all fines, according to the rule," cannot be declared on as a promissory note (*d*). So, an order payable, "Provided the terms mentioned in certain letters, written by the drawer, were complied with," is no bill (*e*). So a note promising to pay, "On the sale or produce of the White Hart, St. Alban's, Herts, and the goods, &c., value received," is not a promissory note, though it be averred that, before action brought, the White Hart and the goods were sold (*f*). The following instrument was held not to be a note: "Borrowed and received of A. the sum of 200*l.* in three drafts, by B., dated as under, payable to us on C., which we promise to pay to the said A., with interest." The instrument then specified the drafts which fell due at a future day. Lord Ellenborough observed, "There can be no doubt that the money was not payable immediately, and that it was not to be paid at all, unless the drafts were honoured" (*g*). So, an order to pay at thirty days after the arrival of the ship Paragon at Calcutta, was held to be no bill of exchange (*h*). So, an order to pay "14*l.* 3*s.* out of the fifth payment, when it should be due, and should be allowed by J. S.," is no bill of exchange (*i*). But, "I promise to pay to J. S., or his order, at three months after date, as *per memorandum* of agreement," was held to be a promissory note, and that if the agreement made the promise conditional, the defendant ought to have shown it by setting it out in his plea (*k*).

An instrument in this form, "At twelve months I promise to pay A. B. 500*l.*, to be held by them as collateral security for any monies now owing to them by M. & M., which they may be unable to recover on realizing the securities they now hold and others which may be placed in their hands by him," is no promissory note (*l*).

Garrett, 4 Mod. 242; Comb. 227, S. C., which was before the statute 3 & 4 Anne, c. 9.

(*d*) *Ayrey* v. *Fearnsides*, 4 M. & W. 168.

(*e*) *Kingston* v. *Long*, Bayley, 16, 6th ed.

(*f*) *Hill* v. *Halford*, 2 B. & P. 413.

(*g*) *Williamson* v. *Bennett*, 2 Camp. 417; and see *Clarke* v. *Perceval*, 2 B. & Ad. 660; *Shenton* v. *James*, 5 Q. B. 199; *Drury* v. *Macaulay*, 16 M. & W. 146; *Alexander* v. *Thomas*, 16 Q. B. 333; *Storm* v. *Stirling*, 3 E. & B. 832; *Cowie* v. *Stirling*, 6 E. & B. 333.

(*h*) *Palmer* v. *Pratt*, 2 Bing. 185; 9 Moo. 358; *Clarke* v. *Perceval*, 2 B. & Ad. 660; *Worley* v. *Harrison*, 5 Nev. & M. 173; 3 A. & E. 669, S. C.

(*i*) *Haydock* v. *Lynch*, 2 Ld. Raym. 1563.

(*k*) *Jury* v. *Baker*, E., B. & E. 459.

(*l*) *Robins* v. *May*, 11 A. & E. 214; 3 Per. & D. 147; 3 Jurist, 1188, S. C.

CHAPTER VII.

Period of payment may be uncertain if inevitable.

But it is not material that the time when the event may happen is uncertain, provided it must happen at some time or other; thus, a note payable on the death of A. B., or of the maker, is good (*m*). So, a note payable when a King's ship shall be paid off, has been held to be a good note, the Court of Error observing, "The paying off of the ship is a thing of a public nature" (*n*). But it is said (*o*), that the Court below assigned as a reason, that the ship would certainly be paid off one time or other (*p*). The contingency, in order to vitiate the note as such, must be apparent on the face of the instrument (*q*). A promissory note payable with interest, twelve months after notice, is not to be considered as payable on a contingency, and is, consequently, valid (*r*).

The happening of the contingency on which the payment of the bill is dependent will not cure the defect (*s*).

Makers or payees liable or entitled in the alternative.

A note beginning, "I, A. B., promise, &c." and signed A. B., or else C. D., is a good note against A. B., but only evidence *as against C. D.* of a conditional agreement to pay if A. B. does not (*t*).

In this last case the maker was uncertain; the note, as such, is not available at all, if the payee be uncertain. Thus, where the maker promised to pay to A. or to B. and C. a certain sum, Abbott, C. J., said, "I have no doubt this instrument is not a promissory note within the statute of Anne: for, if a note is made payable to one or other of two persons, it is payable only on the contingency of its not having been paid to the other, and is not a good promissory note within the statute" (*u*). So a bill of exchange or promissory note payable after date to the

(*m*) *Cooke* v. *Colehan*, 2 Stra. 1217; *Roffey* v. *Greenwell*, 2 Per. & Dav. 365; 10 A. & E. 222.

(*n*) *Andrews* v. *Franklin*, 1 Stra. 24; *Evans* v. *Underwood*, 1 Wils. 262.

(*o*) And see *Haussoullier* v. *Hartkink*, 7 T. R. 733; *Dixon* v. *Nuttall*, 6 C. & P. 320; 1 C., M. & R. 307, S. C.; *Goss* v. *Nelson*, 1 Burr. 226. "I promise to pay or cause to be paid," is a good note, the alternative expression importing the same thing. *Lovell* v. *Hill*, 6 C. & P. 238.

(*p*) *Colehan* v. *Cooke*, Willes, 399; 1 Selw. N. P. 375. A note to an infant, payable when he shall come of age, has been held good, if it specify the particular day. *Goss* v. *Nelson*, 1 Burr. 226; 1 Lord Kenyon, 498, S. C.

(*q*) *Richards* v. *Richards*, 2 B. & Ad. 447.

(*r*) *Clayton* v. *Gosling*, 5 B. & C. 360; 3 D. & R. 110, S. C.

(*s*) Chitty, 7th ed. 45; *Hill* v. *Halford*, 2 B. & P. 413; Chitty, 9th ed. 135, 144.

(*t*) *Ferris* v. *Bond*, 4 B. & Al. 679; and see *Appleby* v. *Biddulph*, B. N. P. 272, cited *Morice* v. *Lee*, 8 Mod. 363; 4 Vin. Ab. 240, pl. 16.

(*u*) *Blanckenhagen* v. *Blundell*, 2 B. & Ald. 417.

secretary *for the time being* of a company is void as a bill or note (*x*).

Not be made payable out of a particular fund.

Upon the same principle, the bill or note must not be made payable out of a particular fund (*y*), for the fund may prove insufficient. Plaintiff drew upon A., and required him to pay B. 7*l.* per month out of plaintiff's growing subsistence. This was held no bill of exchange: for, had plaintiff died, or his subsistence been taken away, the bill would not have been payable (*z*). So, an order from the owner of a ship to the charterer, to pay money on account of freight, is no bill; for the future existence and amount of any debt due for freight are subject to a contingency (*a*). And the same rule holds if the contingency is expressed on the back of the note, by an indorsement made before the note was a perfect instrument (*b*).

But the statement of a particular fund in a bill of exchange will not vitiate it, if introduced merely as a direction to the drawee how to reimburse himself: thus, a bill directing the drawee to pay J. S. 9*l.* 10*s.*, "as my quarterly half-pay," was held to be a good bill (*c*).

Irregular bill or note.

If the instrument be defective as a bill or note, it still may be evidence of an agreement (*d*).

Letters of credit and circular notes.

Letters of credit and circular notes are methods of obtaining credit abroad, introduced for the convenience of travellers and agents, to obviate the trouble and risk of carrying about coin or bank notes.

They are now generally used together, in which case the letter of credit is called a letter of indication.

A letter of credit is an authority, or rather request, by a banker to his foreign correspondents therein named to discount bills drawn on him by the bearer. Circular notes are the unsigned drafts generally for some specific amount given with the letter and to be used or not at the bearer's discretion. The banker usually indemnifies himself against the

(*x*) *Storm* v. *Stirling*, 8 E. & B. 832; *Cowie* v. *Stirling*, 6 E. & B. 333; *Yates* v. *Nash*, 8 C. B. (N. S.) 581; but see *Holmes* v. *Jacques*, ante, p. 74.

(*y*) *Jenny* v. *Herle*, 2 Ld. Raym. 1361; 8 Mod. 265; 1 Stra. 591, S. C.; *Haydock* v. *Lynch*, 2 Ld. Raym. 1553; *Dawkes* v. *Lord de Loraine*, 2 W. Bla. 782; 3 Wils. 207, S. C.; *Yates* v. *Grove*, 1 Ves. jun. 280; *Carlos* v. *Fancourt*, 5 T. R. 482.

(*z*) *Josselyn* v. *Lacier*, 10 Mod. 294; Fort. 281, S. C.; see *Russell* v. *Powell*, 14 M. & W. 418.

(*a*) *Banbury* v. *Lissett*, 2 Stra. 1211.

(*b*) *Leeds* v. *Lancashire*, 2 Camp. 205.

(*c*) *Macleod* v. *Snee*, 2 Str. 762.

(*d*) As to the proper stamp in such a case, see post.

CHAPTER VII.

bills by anticipation, in which case the bearer may recover the balance of his deposit, if any, on surrendering the letter and unused notes (*e*).

It seems that the effect of such instruments is to place the issuer under a contract binding probably at law, but certainly so in equity (*f*), to pay even without acceptance (*g*) all bills drawn in conformity with the letter of credit; and the holders are not to be prejudiced by any set-off or cross claim by the drawee against the drawer (*h*).

Letters of credit to be used in England require a penny stamp, those to be used abroad none, though presumably the drafts when brought to England for payment or negociation fall within the 17 & 18 Vict. c. 83, s. 5 (*i*).

(*e*) But if any of the notes be lost it has been held that a satisfactory indemnity must be given. *Conflans Company* v. *Parker*, L. R., 3 C. P. 1.

(*f*) *Agra and Masterman's Bank* v. *Asiatic Bank*, 36 L. J., Chan. 222.

(*g*) Com. Dig. tit. Merch. F. 3.

(*h*) *Agra and Masterman's Bank*, supra.

(*i*) 16 & 17 Vict. c. 59, sched.

CHAPTER VIII.

OF AGREEMENTS INTENDED TO CONTROL THE OPERATION OF BILLS OR NOTES.

Various sorts of Agreements 97
Effect of contemporaneous Agreement written on the Instrument . . . 97
Effect of an Agreement subsequently written on the Instrument . . . 98
Effect of Agreement written on a distinct Paper . . 98
Agreement contemporaneous but collateral . . . 98
Effect of an oral Agreement 99
Delivery in the nature of an Escrow . . . 99
Agreement to renew . . 100
Agreement on Bill must be read 100
Pleading on Agreement . 100

SUCH agreements are either WRITTEN OR ORAL.

Various sorts of agreements.

A written agreement is either on the instrument itself or on a distinct paper. Again, a written agreement on the instrument itself is either contemporaneous with the completion of the bill or note, or it is a subsequent agreement. Once more, even a contemporaneous written agreement may either be parcel of the instrument, or it may be collateral.

Effect of contemporaneous agreement written on the instrument.

A memorandum on a bill or note, made before it is complete, is sometimes considered as part of the instrument, so as to control its operation, and sometimes not.

If the memorandum make the payment contingent, we have seen that it will be incorporated in the instrument (*a*).

(*a*) *Leeds* v. *Lancashire*, 2 Camp. 205; *Hartley* v. *Wilkinson*, 4 M. & S. 25; 4 Camp. 127, S. C. Though by way of indorsement; *Leeds* v. *Lancashire*, ubi supra. A joint and several promissory note had an indorsement in this form: "The within note is given for securing floating advances from the Lincoln and Lindsay Banking Company, to the within-named Thomas Smith, sen. (one of the joint and several makers of the note), with lawful interest for the same from the respective times when such advances have been or may be made, together with commission, stamps, postages, &c., and all usual charges and disbursements, not exceeding in the whole the sum of 100*l.* within mentioned." It was held to be an agreement which could not be read in evidence without an agreement stamp. *Sed quære*, whether the indorsement were anything more than an explanation of the consideration. *Cholmley* v. *Darley*, 14 M. & W. 344. See the Chapter on CONSIDERATION.

CHAPTER VIII.

But, where it is merely directory, as if it point out the place of payment (*b*), or be merely the expression of an intended courtesy, as if it intimate a wish that the money lent should not be called in by the payee's executors till three years after his death (*c*); or if it import that a collateral security (as the deposit of title deeds) has been given (*d*); or be intended only to identify and ear-mark the instrument (*e*); it does not affect its operation. But a memorandum of the time when a note falls due may correct an error in the date (*f*).

Effect of an agreement subsequently written on the instrument.

A memorandum made after the note is perfected and delivered is an independent agreement, requiring an agreement stamp. "If," says Lord Ellenborough, "the memorandum was subsequently written, when the note had been perfected and delivered in its absolute state, it could not be considered as a part of that instrument, though it chanced to be inscribed upon the same piece of paper. In that case it was an agreement by way of defeasance, and it lay upon the defendant to produce it with a proper stamp" (*g*).

Effect of agreement written on a distinct paper.

A written agreement, on a distinct paper, to renew, or in other respects to qualify the liability of the maker or acceptor, is good as between the original parties (*h*). Thus, if the drawer agree to indemnify the acceptor against a claim by other parties, for a portion of the sum for which the bill is drawn, and the acceptor afterwards pays those other parties a sum to which the indemnity applies, the acceptor's liability, as between himself and the drawer, will be reduced *pro tanto*, and he will not be turned round to his cross action on the indemnity (*i*).

Agreement contemporaneous but collateral.

But a written agreement, though contemporaneous, will not restrain the operation of the bill or note if it be collateral *e. g.*, if other persons besides the parties to the bill or note be parties to it (*k*).

(*b*) *Exon* v. *Russell*, 4 M. & S. 505.

(*c*) *Stone* v. *Metcalfe*, 4 Camp. 217; 1 Stark. 53, S. C.

(*d*) *Wise* v. *Charlton*, 4 A. & E. 786; 6 Nev. & M. 364; 2 Har. & W. 49, S. C.; *Fancourt* v. *Thorne*, 9 Q. B. 812.

(*e*) *Brill* v. *Crick*, 1 M. & W. 232.

(*f*) *Fitch* v. *Jones*, 5 E. & B. 238. And see *Funshawe* v. *Peet*, 2 H. & N. 1.

(*g*) *Stone* v. *Metcalfe*, 4 Camp. 217; 1 Stark. 53, S. C.

(*h*) *Bowerbank* v. *Monteiro*, 4 Taunt. 844.

(*i*) *Carr* v. *Stephens*, 9 B. & C. 758; 4 M. & R. 591, S. C.

(*k*) *Webb* v. *Spicer*, 19 L. J., Q. B. 34; 13 Q. B. 894, S. C.; on error in Exchequer Chamber.

Effect of an oral agreement.

No mere oral agreement can have any effect at law in controlling the instrument, if contemporaneous with the making of it; for that would be to allow oral evidence to vary a written contract (*l*). "Every bill or note," says Parke, J., "imports two things, value received, and an engagement to pay the amount on certain specified terms. Evidence is admissible to deny the receipt of value, but not to vary the engagement" (*m*).

Delivery in the nature of an escrow.

An instrument under seal may be delivered as an escrow that is to say, with a condition that it shall not operate as a deed, except in a certain event. An instrument under seal, which is to operate as an escrow, must be delivered, not to the obligee, but to a stranger, and regularly the condition should be expressed by apt words used at the time of the delivery (*n*).

In analogy with a deed, it has been held that a written and signed simple contract may be delivered with an express parol condition precedent, that it is not to take effect except in a

(*l*) *Hoare* v. *Graham*, 3 Camp. 57; *Free* v. *Hawkins*, 8 Taunt. 92; 1 Moore, 28, S. C.; *Woodbridge* v. *Spooner*, 8 B. & Al. 233; 1 Ch. R. 661, S. C.; *Moseley* v. *Hanford*, 10 B. & C. 729; *Foster* v. *Jolly*, 1 C., M. & R. 703; 5 Tyr. 255, S. C.; *Richards* v. *Thomas*, 1 C., M. & R. 772; *Holt* v. *Miers*, 9 C. & P. 191; *Besant* v. *Cross*, 10 C. B. 895.

(*m*) *Abbott* v. *Hendricks*, 1 M. & G. 795; *Moseley* v. *Hanford*, 10 B. & C. 729. "The cases," says Maule, J., "show that although a consideration is stated in the note, you may show that it was given for a different consideration or without any consideration at all." *Abbott* v. *Hendricks*, 1 M. & G. 791; 2 Scott, N. R. 183, S. C.; but see *Ridout* v. *Bristow*, 1 C. & J. 231; 1 Tyr. 84, S. C., and *Edwards* v. *Jones*, 2 M. & W. 414; 5 Dowl. 585; 7 C. & P. 633, S. C.

In *Pike* v. *Street*, 1 Dans. & Lloyd, 159; 1 M. & M. 226, it was held a good defence to an action against the drawer that, at the time when the plaintiff discounted the bill, he verbally agreed, in the event of its being dishonoured, not to proceed against the drawer, who had indorsed the bill to him. An indorsement may, perhaps, be excepted from the rule in the text on account of its twofold operation, it being at once an express assignment to the indorsee of the right of action against the acceptor, and containing incorporated therewith an implied conditional promise on the part of the indorser to pay on the acceptor's default. This conditional promise may be varied by parol, so as to increase the indorser's liability. *Phipson* v. *Kelner*, 4 Camp. 285; *Burgh* v. *Legge*, 5 M. & W. 418; *Brett* v. *Levett*, 13 East, 214. It may therefore by analogy well be varied by parol so as to diminish his liability. See the numerous American authorities on the point, Byles on Bills, 5th American ed. 196. See also the Chapter on TRANSFER.

(*n*) Sheppard's Touchstone, 58; see *Murray* v. *Earl of Stair*, 2 B. & C. 82, where the Court of King's Bench expressed an opinion that it was not indispensable that express words should be used at the time, but that the condition might be gathered from circumstances.

CHAPTER VIII.

certain event. And the instrument may be so delivered, not only to a stranger, but by one party to the other (*o*). And evidence of the parol condition is admissible not only when it is relied on as a condition, but also when an action is brought upon it as an agreement (*p*).

When such a doctrine is extended to a bill of exchange or promissory note, it is obvious that it must not be applied to the injury of a holder for value without notice.

Agreement to renew.

An agreement to renew, without more, is an agreement to renew once only (*q*).

Agreement on bill must be read.

A defendant has a right at the trial to call on the plaintiff to read any indorsements that may be on the bill (*r*).

Pleading.

Though it be necessary that the agreement affecting the operation of the bill or note should be in writing, it is not necessary in pleading to aver that it is in writing (*s*).

(*o*) *Davis* v. *Jones*, 17 C. B. 625; *Pym* v. *Campbell*, 6 E. & B. 370; *Wallis* v. *Littell*, C. B., M. T. 1861; 31 L. J. 101, C. P.; *Lara* v. *Hacon*, E. T., C. P. 1863; *Rogers* v. *Hadley*, 32 L. J., Ex. 241. In this last case parol evidence was held admissible to show that a contract signed and delivered was never intended to be the real contract between the parties.

(*p*) *Hindley* v. *Lacey*, 34 L. J., C. P. 7.

(*q*) *Innes* v. *Munro*, 1 Exch. 478. See as to an agreement to renew being used as a defence to an action, *Flight* v. *Gray*, 3 C. B., N. S. 320; *Webb* v. *Spicer*, 13 Q. B. 886, 894; *Salmon* v. *Webb*, 3 H. L. Cas. 510. The point did not arise in *Innes* v. *Munro*.

(*r*) *Richards* v. *Frankum*, 9 C. & P. 221. As to agreements by clerks in fraud of their employers, see *Bosanquet* v. *Foster*, 9 C. & P. 659; *Bosanquet* v. *Corser*, 9 C. & P. 664.

(*s*) *Kearns* v. *Durell*, 18 L. J., C. P. 28; 6 C. B. 596, S. C. See *Gilbert* v. *Whitmarsh*, 8 Q. B. 969; *Austin* v. *Young*, C. P., E. T. 1869.

CHAPTER IX.

OF THE STAMP.

When Stamps were first imposed on Bills or Notes . 101
Adhesive Stamps . . 110
On Foreign Bills . . 110
What Regulations of former Stamp Acts are still in Force 111
In what Cases a Bill or Note may be restamped . . 111
Effect of Alteration of the Law 112
What Bills or Notes are exempt from Stamps . 112
Stamps on Foreign Bills and Notes . . . 112
Penalty on unstamped Instruments . . . 112
What Notes may be re-issued 112
Stamps on Foreign Bills . 113
Stamps on Irish or Colonial Bills 113
What is such a making within the Kingdom as to subject to a Stamp . 113
Effect of want of a Stamp on the Instrument . . 113
Fresh Dies 115
Effect of post stamping against Law . . . 115
Reservation of Interest does not make a larger Stamp necessary . . . 116
Nor post dating . . 116
On Instruments which are in Law but Agreements . 116
Sufficiency of Stamp admitted by paying Money into Court . . . 116
When the Objection to the Stamp should be taken . 116
Pleading 117

IN treating of the Stamp Laws as they affect bills and notes, let us first review the principal statutory enactments, and then the most important decisions of the Courts on this subject; postponing the consideration of the effect, under the Stamp Laws, of altering a bill or note, to a subsequent Chapter, which will show the effect of alteration, both at common law and under the Stamp Acts.

When stamps were first imposed on bills and notes.

Bills and notes were exempt from any stamp duty till the 22 Geo. 3, c. 33. This act was repealed and followed by several other stamp acts affecting them, which contain many regulations still in force, though the amount of duty which they impose was altered by the last General Stamp Act, 55 Geo. 3, c. 184, and several subsequent acts.

The duties imposed by the General Stamp Act on bills of exchange and promissory notes were, for the most part,

CHAPTER IX.

repealed by the 16 & 17 Vict. c. 59, and the 17 & 18 Vict. c. 83, and new duties imposed, which are now as follows :—

	£	s.	d.
DRAFT or ORDER for the payment of any sum of money to the bearer or to order, on demand (*a*)	0	0	1
INLAND BILL OF EXCHANGE, draft, or order for the payment to the bearer, or to order, at any time otherwise than on demand, of any sum of money (*b*)—			
Not exceeding 5*l.*	0	0	1
Exceeding 5*l.* and not exceeding 10*l.* . .	0	0	2
„ 10*l.* „ 25*l.* . .	0	0	3
„ 25*l.* „ 50*l.* . .	0	0	6
„ 50*l.* „ 75*l.* . .	0	0	9
„ 75*l.* „ 100*l.* . .	0	1	0
„ 100*l.* „ 200*l.* . .	0	2	0
„ 200*l.* „ 300*l.* . .	0	3	0
„ 300*l.* „ 400*l.* . .	0	4	0
„ 400*l.* „ 500*l.* . .	0	5	0
„ 500*l.* „ 750*l.* . .	0	7	6
„ 750*l.* „ 1,000*l.* . .	0	10	0
„ 1,000*l.* „ 1,500*l.* . .	0	15	0
„ 1,500*l.* „ 2,000*l.* . .	1	0	0
„ 2,000*l.* „ 3,000*l.* . .	1	10	0
„ 3,000*l.* „ 4,000*l.* . .	2	0	0
And where the same shall exceed 4,000*l.*, then for every 1,000*l.*, or part of 1,000*l.* of the money thereby made payable (*c*) . . .	0	10	0
Inland bill, draft, or order for the payment of any sum of money, though not made payable to the bearer, or to order, if the same shall be delivered to the payee, or some person on his or her behalf, the same duty as on a bill of exchange for the like sum, payable to bearer or order.			
Inland bill, draft, or order for the payment of any sum of money, weekly, monthly, or at any other stated periods, if made payable to the bearer, or to order, or if delivered to the payee, or some person on his or her behalf, whether the total amount of the money thereby made payable shall be specified therein, or can be ascertained there-			

(*a*) 16 & 17 Vict. c. 59; 21 Vict. c. 20, s. 1.

(*b*) 17 & 18 Vict. c. 83.

(*c*) 23 Vict. c. 15.

from, or shall be indefinite—the same duty as on a bill payable to bearer or order, on demand (*d*).

And the following instruments are to be deemed and taken to be (*e*) inland bills, drafts, or orders, for the payment of money, chargeable with stamp duty, *viz.*:—

All drafts or orders for the payment of any sum of money, by a bill or promissory note, or for the delivery of any such bill or note, in payment or satisfaction of any sum of money, where such drafts or orders shall require the payment or delivery to be made to the bearer, or to order, or shall be delivered to the payee, or some person on his or her behalf.

All receipts given by any banker or bankers, or other person or persons, for money received, which shall entitle, or be intended to entitle, the person or persons paying the money, or the bearer of such receipts, to receive the like sum from any third person or persons.

(*d*) 55 Geo. 3, c. 184.

(*e*) 55 Geo. 3, c. 184. These and the corresponding provisions relating to promissory notes were introduced to include such instruments as, being payable on a contingency or out of a particular fund, are not, strictly speaking, either bills or notes. See Chapter VII.; *Firbank* v. *Bell*, 1 B. & Ald. 39. Where A. having directed B. by letter to pay C. 1,500*l.* out of the proceeds of certain unsold goods of A. in B.'s hands, and B. in a letter to C. having agreed to do so (which letter was stamped with an agreement stamp), it was held, that as there was no agreement between A. and B., the first letter was inadmissible in evidence without a bill stamp. Ibid. So a letter desiring the correspondent of the writer to pay third persons or their order 600*l.* out of the first proceeds of a stock of gunpowder, and to charge the same to account, was held liable to a bill stamp, though it form part of a subsequent correspondence between the three houses. *Butts* v. *Swann*, 2 B. & B. 78; 4 Moore, 484, S. C. But unless the order specify *a definite sum*, these provisions do not apply, and a bill stamp is not required. Therefore where the consignor of goods gave his consignee this order, "Pay to A. B. the proceeds of a shipment of goods value about 2,000*l.* consigned by me to you," and C., by writing, agreed to pay over the full amount of the net proceeds of the goods; it was held, that neither of these instruments required a bill or note stamp. *Jones* v. *Simpson*, 2 B. & C. 318; 3 D. & R. 545, S. C.; and see *Barlow* v. *Broadhurst*, 4 Moore, 471; *Crawfoot* v. *Gurney*, 9 Bing. 372; *Hutchinson* v. *Heyworth*, 1 Per. & D. 266; 9 A. & E. 375, S. C. A note written by a creditor, at the foot of an account, requesting the debtor to pay that account to A. B., and which the creditor delivered to A. B. for the purpose of his getting in the money for the creditor, is not a bill of exchange or order for payment of money within the Stamp Act. *Norris* v. *Solomon*, 2 M. & R. 266.

CHAPTER IX.

All bills, drafts, orders, for the payment of any sum of money out of any particular fund (*f*), which may or may not be available, or upon any condition or contingency which may or may not be performed or happen, if the same shall be made payable to the bearer, or to order, or if the same shall be delivered to the payee, or to some person on his or her behalf.

All documents or writings usually termed letters of credit, or whereby any person to whom any such document or writing is or is intended to be delivered or sent shall be entitled, or be intended to be entitled, to have credit with or in account with or to draw upon any other person for, or to receive from such other person, any sum of money therein mentioned (*g*).

All bills, drafts, or orders, for the payment by any banker, or person acting as a banker, of any sum of money, though not made payable to the bearer or to order, and whether delivered to the payee or not, and writings or documents entitling, or intended to entitle, any person whatever to the payment from or by any banker, or person acting as a banker, of any sum of money, whether the person to whom payment is to be made shall be named or designated therein or not, or whether the same shall be delivered to him or not, as if the same had been made payable to bearer or to order.

Provided always, that any one document or writing, although directing the payment of several sums of money to different persons, shall be chargeable with stamp duty as one order only (*h*).

Exemptions from the Duties on Drafts or Orders.

All letters of credit, whether in sets or not, sent by persons in the United Kingdom to persons

(*f*) *Diplock* v. *Hammond*, 23 L. J., Cha. 550; 5 De G., M. & G. 320, S. C.

(*g*) 16 & 17 Vict. c. 59.

(*h*) 23 Vict. c. 15. Any such document, being sent or delivered by the person making or giving the same to the banker or person acting as a banker, by or through whom the payment is to be made, and not to the person to whom such payment is to be made, or to any person on his behalf, is chargeable with the duty of one penny only, notwithstanding the payment shall be or have been thereby directed to be made at any time after the date thereof, which duty may be denoted by an adhesive stamp, to be cancelled as in the case of a draft or order on demand. 23 & 24 Vict. c. 111, s. 17.

abroad authorizing drafts on the United Kingdom (*i*).

Any draft or order drawn by any banker upon any other banker not payable to bearer or to order, and used solely for the purpose of settling or clearing any account between such bankers.

Any letter written by a banker to any other banker, directing the payment of any sum of money, the same not being payable to bearer or to order, and such letter not being sent or delivered to the person to whom payment is to be made or to any person on his behalf.

All warrants or orders for the payment of any annuity granted by the commissioners for the reduction of the national debt, or for the payment of any dividend or interest on any share in the government or parliamentary stocks or funds, and all drafts or orders drawn by the accountant-general of the Court of Chancery in England or Ireland (*k*).

FOREIGN BILL OF EXCHANGE drawn in, but payable out of, the United Kingdom (*l*).

If drawn singly or otherwise than in a set of three or more, the same duty as on an inland bill of the same amount and tenor.

If drawn in sets of three or more (*m*), for every bill of each set—

			£	*s.*	*d.*
Where the sum payable thereby shall not exceed 25*l.*			0	0	1
And where it shall exceed 25*l.*	and not exceed	50*l.*	0	0	2
„ 50*l.*	„	75*l.*	0	0	3
„ 75*l.*	„	100*l.*	0	0	4
„ 100*l.*	„	200*l.*	0	0	8
„ 200*l.*	„	300*l.*	0	1	0
„ 300*l.*	„	400*l.*	0	1	4
„ 400*l.*	„	500*l.*	0	1	8
„ 500*l.*	„	750*l.*	0	2	6
„ 750*l.*	„	1,000*l.*	0	3	4
„ 1,000*l.*	„	1,500*l.*	0	5	0
„ 1,500*l.*	„	2,000*l.*	0	6	8
„ 2,000*l.*	„	3,000*l.*	0	10	0
„ 3,000*l.*	„	4,000*l.*	0	13	4

(*i*) 16 & 17 Vict. c. 59.
(*k*) 23 Vict. c. 15.
(*l*) 17 & 18 Vict. c. 83.
(*m*) The 17 & 18 Vict. c. 83, s. 6, imposes a penalty of 100*l.* upon the person drawing and issuing, or transferring or negotiating, any bill purporting to be drawn in a set,

CHAPTER IX.

	£	s.	d.
And where it shall exceed 4,000*l.*, then for every 1,000*l.*, and part of 1,000*l.* of the money thereby made payable (*n*).	0	3	4
Foreign bill of exchange, for the payment of money not exceeding 500*l.*, drawn out of, but payable within, the United Kingdom, the same duty as on an inland bill of the same amount and tenor (*o*).			
For the payment of money exceeding 500*l.*, drawn out of the United Kingdom, and payable or indorsed or negotiated within the United Kingdom. For every 100*l.*, and part of 100*l.*, of the money thereby made payable (*p*).	0	1	0
Foreign bill of exchange, drawn out of the United Kingdom, and payable out of, but indorsed or negotiated within, the United Kingdom, the same duty as on a foreign bill drawn within, and payable out of, the United Kingdom (*q*).			
Foreign bill of exchange, draft, or order, drawn or indorsed out of the United Kingdom, for the payment of money on demand, the same duty as on an inland bill of exchange for the payment of money otherwise than on demand, according to the amount thereby made payable (*r*).			

Exemptions from the preceding and all other Stamp Duties (s).

All bills of exchange, or bank post bills, issued by the Governor and Company of the Bank of England.

All bills, orders, remittance bills and remittance

without at the same time drawing and issuing, or transferring or delivering, duly stamped, the whole number of bills of the set, and prevents the person taking the bill from recovering upon it.

(*n*) 23 Vict. c. 15.

(*o*) By the 17 & 18 Vict. c. 83, s. 4, every bill which shall purport to be drawn at any place out of the United Kingdom shall be deemed to be a foreign bill drawn out of the United Kingdom, and be charged accordingly, notwithstanding it may have in fact been drawn within the United Kingdom. By the 27 & 28 Vict. c. 56, s. 2, any bill of exchange payable on demand which shall be indorsed out of the United Kingdom, or purport to be so indorsed, wheresoever the same may have been drawn, shall be deemed to be a foreign bill and charged accordingly.

(*p*) 24 & 25 Vict. c. 21.

(*q*) 17 & 18 Vict. c. 83.

(*r*) 23 Vict. c. 15.

(*s*) 55 Geo. 3, c. 184.

certificates, drawn by commissioned officers, masters, and surgeons in the Navy, or by any commissioner or commissioners of the Navy, under the authority of the act passed in the thirty-fifth year of his Majesty's reign, for the more expeditious payment of the wages and pay of certain officers belonging to the Navy.

All bills drawn pursuant to any former act or acts of Parliament, by the commissioners of the Navy, or by the commissioners for victualling the Navy, or by the commissioners for managing the transport service, and for taking care of sick and wounded seamen, upon, and payable by, the Treasurer of the Navy.

All bills for the pay and allowance of his Majesty's land forces, or for other expenditures liable to be charged in the public regimental or district accounts, which shall be drawn according to the forms now prescribed, or hereafter to be prescribed, by his Majesty's orders, by the paymasters of regiments or corps, or by the chief paymaster, or deputy paymaster, and accountant of the army depôt, or by the paymasters of recruiting districts, or by the paymasters of detachments, or by the officer or officers authorized to perform the duties of the paymastership during the vacancy, or the absence, suspension or incapacity of any such paymaster, as aforesaid; save and except such bills as shall be drawn in favour of contractors, or others, who furnish bread or forage to his Majesty's troops, and who, by their contracts or agreements, shall be liable to pay the stamp duties on the bills given in payment for the articles supplied by them.

PROMISSORY NOTE (*t*) for the payment to the bearer on demand, of any sum of money (*u*)—	£	*s.*	*d.*
Not exceeding 1*l.* 1*s.*	0	0	5

(*t*) It was once held that a promissory note for 11*l.* to A. B. on demand, without the words "or bearer," was a note payable to bearer on demand within this class and re-issuable. *Keates* v. *Whieldon*, 8 B. & C. 7; 2 M. & Ry. 8, S. C. This case, however, was always considered doubtful, and is now overruled. *Cheetham* v. *Butler*, 5 B. & Ad. 837; 2 N. & M. 453, S. C.; *Dixon* v. *Chambers*, 1 C., M. & R. 845; 5 Tyr. 202; 1 Gale, 14, S. C.

(*u*) 55 Geo. 3, c. 184.

CHAPTER IX.

	£	s.	d.
Exceeding 1*l.* 1*s.* and not exceeding 2*l.* 2*s.*	0	0	10
„ 2*l.* 2*s.* „ 5*l.* 5*s.*	0	1	3
„ 5*l.* 5*s.* „ 10*l.*	0	1	9
„ 10*l.* „ 20*l.*	0	2	0
„ 20*l.* „ 30*l.*	0	3	0
„ 30*l.* „ 50*l.*	0	5	0
„ 50*l.* „ 100*l.*	0	8	6

Which said notes may be re-issued, after payment thereof, as often as shall be thought fit (*x*).

Promissory note for the payment in any other manner than to the bearer on demand of any sum of money (*y*)—

Not exceeding 5*l.*	0	0	1
Exceeding 5*l.* and not exceeding 10*l.*	0	0	2
„ 10*l.* „ 25*l.*	0	0	3
„ 25*l.* „ 50*l.*	0	0	6
„ 50*l.* „ 75*l.*	0	0	9
„ 75*l.* „ 100*l.*	0	1	0

Promissory note for the payment, either to the bearer on demand, or in any other manner than to the bearer on demand, of any sum of money (*z*)—

Exceeding 100*l.* and not exceeding 200*l.*	0	2	0
„ 200*l.* „ 300*l.*	0	3	0
„ 300*l.* „ 400*l.*	0	4	0
„ 400*l.* „ 500*l.*	0	5	0
„ 500*l.* „ 750*l.*	0	7	6
„ 750*l.* „ 1,000*l.*	0	10	0
„ 1,000*l.* „ 1,500*l.*	0	15	0
„ 1,500*l.* „ 2,000*l.*	1	0	0
„ 2,000*l.* „ 3,000*l.*	1	10	0
„ 3,000*l.* „ 4,000*l.*	2	0	0
And where the same shall exceed 4,000*l.*, then for every 1,000*l.*, or part of 1,000*l.*, of the money thereby made payable (*a*)	0	10	0

Foreign promissory note, made or purporting to be made out of the United Kingdom, for the payment within the United Kingdom of any sum

(*x*) They can be lawfully issued by licensed bankers only, and the issuing of any for sums less than 5*l.* is prohibited in England by 7 Geo. 4, c. 6, and in Scotland by 8 & 9 Vict. c. 38.

(*y*) 17 & 18 Vict. c. 83.

(*z*) Ibid.

(*a*) 23 & 24 Vict. c. 111.

of money, the same duty as on an inland bill of exchange for the payment, otherwise than on demand, of money of the same amount (*b*).

And the following instruments shall be deemed and taken to be promissory notes, within the intent of the statutes granting duties (*c*), *viz.*:

All notes promising the payment of any sum or sums of money out of any particular fund, which may or may not be available; or upon any condition or contingency, which may or may not be performed or happen; if the same shall be made payable to the bearer or to order, or if the same shall be definite and certain, and not amount in the whole to twenty pounds.

And all receipts for money deposited in any bank, or in the hands of any banker or bankers, which shall contain any agreement or memorandum, importing that interest shall be paid for the money so deposited.

Exemptions from Duties on Promissory Notes (*d*).

All notes, promising the payment of any sum or sums of money out of any particular fund, which may or may not be available; or upon any condition or contingency, which may or may not be performed or happen; where the same shall not be made payable to the bearer or to order, and also where the same shall be made payable to the bearer or to order, if the same shall amount to twenty pounds, or be indefinite.

And all other instruments, bearing in any degree the form or style of promissory notes, but which in law shall be deemed special agreements, except those hereby expressly directed to be deemed promissory notes.

But such of the notes and instruments here exempted from the duty on promissory notes shall nevertheless be liable to the duty which may attach thereon, as agreements or otherwise.

(*b*) 23 & 24 Vict. c. 111.
(*c*) 55 Geo. 3, c. 184.
(*d*) 55 Geo. 3, c. 184.

CHAPTER IX.

Exemptions from the preceding and all other Stamp Duties.

All promissory notes for the payment of money, issued by the Governor and Company of the Bank of England.

	£	*s.*	*d.*
PROTEST of any bill of exchange or promissory note (*e*) where the stamp duty on the bill or note does not exceed one shilling, the same duty as on bill or note.			
Protest of any other bill of exchange or promissory note	0	1	0

Adhesive stamps.

The 16 & 17 Vict. c. 59, and 17 & 18 Vict. c. 83, first introduced the use of adhesive stamps on drafts or orders for the payment of money. For the provisions as to these the reader is referred to the 16 & 17 Vict. c. 59, ss. 3 and 5; 17 & 18 Vict. c. 83, ss. 3, 4, 5, 7, 8 and 13; 23 Vict. c. 15, ss. 12 and 13, and 23 & 24 Vict. c. 111, ss. 5 and 18. They will be found in the Appendix.

On foreign bills.

It is to be observed that the 17 & 18 Vict. c. 83, ss. 3, 4, 5 and 6, first imposed a stamp duty on bills drawn out of the United Kingdom, and paid or negotiated within it. This is effected by an adhesive stamp affixed to the instrument and cancelled by the name of the party or of his firm, the date (*f*) of the cancellation being written upon it (*g*); and the person to whom it is presented for payment is, upon paying it, to write or impress upon the stamp the word "paid" (*h*). It has been held that a stamp was not necessary where a bill was indorsed abroad and transmitted to England, in order to presentment, for acceptance (*i*), such a transaction not amounting to negotiation.

A cancellation by writing the initials, or stamping or impressing them in ink, provided the stamp is effectually obliterated and cancelled so as not to admit of its being used again, is sufficient; and the holder of a foreign bill, having affixed thereto a proper and sufficient adhesive stamp, may cancel the same as if he were the person first negotiating

(*e*) 24 & 25 Vict. c. 91, s. 25.
(*f*) *Gilmore* v. *Whitmarsh*, 2 F. & F. 295.
(*g*) 23 Vict. c. 15, s. 12.
(*h*) See as to the consequences of not duly cancelling, *Pooley* v. *Brown*, 31 L. J., C. P. 134.
(*i*) *Sharples* v. *Richard*, 2 H. & N. 57; *Griffin* v. *Weatherby*, L. R., 3 Q. B. 753.

the bill, but this is not to relieve any person who ought to cancel the stamp from any penalty (*j*).

If the transferer of a foreign bill neglect to cancel the stamp, and the transferee takes the bill without such cancellation, the transferee cannot recover the value from the transferer, for he was *particeps criminis* (*h*).

What regulations of former stamp acts are still in force.

It is necessary to observe, that the eighth section of the General Stamp Act, 55 Geo. 3, c. 184, declares that all the regulations in former stamp acts (*k*) are still in force, so far as the same are applicable to the duties granted by that act. The 16 & 17 Vict. c. 59, and the 17 & 18 Vict. c. 83, also contain provisions expressly preserving the effect of former enactments, not inconsistent with the alterations introduced by those statutes. Among these are the following :—

The 31 Geo. 3, c. 25, s. 19, enacts, that unstamped bills notes, or drafts shall not be admissible in evidence, or available in law or equity.

The same section prohibits the commissioners from stamping any bill or note after it is made.

But the 37 Geo. 3, c. 136, ss. 5 and 6, authorizes the commissioners to restamp any bill or note on which has been affixed a stamp of a wrong denomination, but of value equal or superior to the proper stamp, on payment of a penalty of 10*s.* if the bill or note be not due, and 10*l.* if it be (*l*).

The 43 Geo. 3, c. 127, s. 6, enacts, that every instrument bearing a stamp of greater value than required by law shall be valid, if of the proper denomination.

In what cases a bill or note may be restamped.

And, by the General Stamp Act, 55 Geo. 3, c. 184, s. 10, it will be seen, that though the stamp be of a wrong denomination, if of sufficient value, it will be valid, unless on the face of it specifically appropriated to some other instrument. And in the last case, it is apprehended that a bill or note may be restamped under the 37 Geo. 3, c. 136, ss. 5 and 6 (*m*).

A promissory note which amounts to a mortgage may be impressed with the mortgage stamp after it is made (*n*).

(*j*) 24 & 25 Vict. c. 91, s. 33.

(*k*) *Field* v. *Woods*, 7 A. & E. 114; 2 N. & P. 117, S. C.

(*l*) See *Bradley* v. *Bardsley*, 3 D. & L. 476; 14 M. & W. 873, S. C.

(*m*) See *Chamberlain* v. *Porter*, 1 N. R. 30; *Heiser* v. *Grout*, 5 H. & N. 35.

(*n*) *Wise* v. *Charlton*, 4 A. & E. 786; 6 N. & M. 364; 2 H. & W. 49, S. C.

CHAPTER IX.

Effect of alteration of the law.

It is sufficient if an instrument be subsequently stamped according to the law at the time the stamp is affixed, although a higher stamp should have been necessary at the time the instrument was executed (*o*).

What bills or notes are exempt from stamps.

From the foregoing and other statutes it will appear that the following instruments are exempt from duty :—

1. Bank of England bills and notes (*p*).
2. Notes for one pound, one guinea, two pounds, and two guineas, payable to the bearer on demand, issued by the Bank of Scotland, Royal Bank of Scotland, or the British Linen Company in Scotland (*q*).
3. Bills or notes issued by bankers paying a composition in lieu of stamps, pursuant to 9 Geo. 4, c. 23 (*r*).
4. Bills drawn for the expenses of the army and navy (*s*).
5. Notes of loan societies (*t*) and friendly societies (*u*).

Stamps on foreign bills and notes.

Foreign bills and promissory notes, negotiated or paid in the United Kingdom, must, as we have seen, have an adhesive stamp affixed (*x*).

Penalty on unstamped instruments.

The making, issuing, accepting, or paying any bill, note, or draft, not falling within the above exemptions, and not duly stamped, subjects to the penalty of 50*l.* (*y*). The 55 Geo. 3, c. 184, s. 29, exempts notes made and payable in Ireland.

What notes may be re-issued.

Notes payable to the bearer on demand, for any sum not exceeding 100*l.*, and not less than 5*l.*, duly stamped according to the 55 Geo. 3, c. 184, may be re-issued after payment, as often as may be thought necessary, without a new

(*o*) *Doe* v. *Whittingham*, 4 Taunt. 20; *Buckworth* v. *Simpson*, 1 C., M. & R. 834; *Deakin* v. *Pennial*, 2 Exch. 320.

(*p*) 55 Geo. 3, c. 184, s. 21; 7 & 8 Vict. c. 32, s. 7.

(*q*) Sect. 23; and see 16 & 17 Vict. c. 63, s. 7.

(*r*) And see 7 Geo. 4, c. 46, s. 16; 7 & 8 Vict. c. 32, s. 22; 17 & 18 Vict. c. 83, s. 11.

(*s*) 55 Geo. 3, c. 184, Sched. part 1.

(*t*) See 5 & 6 Will. 4, c. 23, 3 & 4 Vict. c. 110; 21 Vict. c. 19. Although the form of note given by the statute be joint only, yet a joint and several note is within the exemption. *Bradburne* v. *Whitbread*, 5 M. & G. 439; see ante, p. 7.

(*u*) 18 & 19 Vict. c. 63.

(*x*) 17 & 18 Vict. c. 83; 23 & 24 Vict. c. 111; and see the Chapter on FOREIGN BILLS as to stamps on bills, foreign, Scotch, Irish, or Colonial.

(*y*) 55 Geo. 3, c. 184, s. 11.

stamp (*z*), provided an annual licence for that purpose be taken out (*a*).

Re-issuing notes, against the provisions of the act, subjects the person re-issuing them to a penalty of 50*l.*, and the duty: and any person knowingly taking them, to a penalty of 20*l.* (*b*). But the payment mentioned in the act, after which bills and notes cannot be re-issued, is a payment at maturity (*c*).

Issuing re-issuable notes, without a licence, subjects to the penalty of 100*l.* (*d*). It has been held, under the former acts, that where a bill is made payable to the drawer's own order, and returned to the drawer and paid *by him*, he may, without a fresh stamp, indorse the bill over to a new party, who may sue the acceptor (*e*). But it is otherwise if the payee were a third person (*f*). Or if the drawer were the party ultimately liable to pay the bill (*g*).

Stamps on foreign bills.

As to foreign stamps on foreign bills, see the Chapter on FOREIGN BILLS.

Stamps on Irish or Colonial Bills.

As to the stamps on Irish or Colonial bills, see the same Chapter.

What is such a making within the kingdom as to subject to a stamp.

A question sometimes arises as to what shall be deemed such a making within this country as to subject an instrument to the English Stamp Laws. On this subject, see the Chapter on FOREIGN BILLS.

Effect of want of a stamp on the instrument.

A bill not duly stamped is not available, nor evidence, in law or equity, for any purpose in furtherance of its original design, not even as an admission (*h*). Defendant indorsed

(*z*) Sect. 14.

(*a*) Sects. 24, 25, 26, 27, 28; 7 Geo. 4, c. 6; and see 9 Geo. 4, c. 23, ss. 1, 12.

(*b*) Sect. 19. *Holroyd* v. *Whitehead*, 1 Marsh. 128.

(*c*) *Morley* v. *Culverwell*, 7 M. & W. 174, by the party primarily liable; see *Bartrum* v. *Caddy*, 9 A. & E. 275; 1 P. & D. 207, S. C.

(*d*) 55 Geo. 3, c. 184, s. 27.

(*e*) *Callow* v. *Lawrence*, 3 M. & S. 95.

(*f*) *Beck* v. *Robley*, 1 H. Bla. 89; and see *Graves* v. *Key*, 3 B. & Ad. 313.

(*g*) *Lazarus* v. *Cowie*, 3 Q. B. 465.

(*h*) *Wilson* v. *Vysar*, 4 Taunt. 288; *Jardine* v. *Payne*, 1 B. & Ad. 663; *Cundy* v. *Marriott*, 1 B. & Ad. 696. But an unstamped instrument is admissible to prove an agreement illegal, *Coppock* v. *Bower*, 4 M. & W. 361; or to prove usury, *Nash* v. *Duncomb*, 1 M. & Rob. 184; or to corroborate a witness, *Dover* v. *Maestaer*, 5 Esp. 92; or to refresh his memory, *Maugham* v. *Hubbard*, 8 B. & C. 14. And the Court of C. P. have allowed an unstamped bill to be given in evidence to negative by anticipation a plea of payment. *Smart* v. *Nokes*, 6 M. & G. 911, S. C. *Sed quære.*

CHAPTER IX.

to plaintiff a bill on an insufficient stamp, in payment of goods sold: plaintiff delayed presenting it for payment, and the acceptor became unable to pay. Defendant proved that the bill would have been paid if presented at maturity. Held, that the bill never operated as a suspension of the debt, and that the plaintiff's laches did not discharge the defendant (*i*). So, the indorser of a bill drawn on an insufficient stamp, is not discharged from his debt by neglect of the indorsee to present or give him notice of dishonour (*k*). But an instrument not duly stamped may be looked at for a collateral purpose. Action for money lent; the plaintiff's witnesses proved that plaintiff had lent defendant 40*l*., and that defendant had given him a promissory note on unstamped paper. The defendant's case was, that plaintiff had inveigled him to drink, and that the transaction was fraudulent. The note was produced. Lord Ellenborough: "The note certainly cannot be received in evidence as a security, or to prove the loan of the money; but I think it may be looked at by the jury as a contemporary writing to prove or disprove the fraud imputed to the plaintiff." The note was put in, and had very much the appearance of having been written by a drunken man. Verdict for the defendant (*l*). The statute 17 & 18 Vict. c. 83, s. 27, contains an express provision that an unstamped instrument may be admitted in any *criminal* proceeding. But long before that statute it had been held that it is no defence, on a prosecution for forgery, that the instrument was not duly stamped (*m*). So, it has been held, that if A. and B. enter into a written agreement, duly stamped, and afterwards enter into another written agreement on the same subject-matter, but inconsistent with the first, and not stamped, though the plaintiff cannot give the second agreement in evidence, it may be looked at by the Court to prove that the first agreement was rescinded (*n*). But where the acceptor of the bill required the drawer, who was an illiterate person, to take his second acceptance at six months, in lieu of payment, and the drawer having assented, the acceptor's son wrote the second bill on the back of the

(*i*) *Wilson* v. *Vysar*, 4 Taunt. 288.

(*k*) *Cundy* v. *Marriott*, 1 B. & Ad. 696; *Wilson* v. *Vysar*, 4 Taunt. 288; *Plimley* v. *Westley*, 2 Bing. N. C. 249; 2 Scott, 423; 1 Hodges, 324, S. C.

(*l*) *Gregory* v. *Fraser*, 3 Camp. 454. And see *Holmes* v. *Sixsmith*, 7 Exch. 802; *Watson* v. *Poulson*, 15 Jur. 1111; *Keable* v. *Payne*, 8 A. & E. 555; *Reg.* v. *Gompertz*, 9 Q. B. 824.

(*m*) *Rex* v. *Hawkswood*, Bayley, 91, 6th ed.; 3 East, P. C. 955; *Rex* v. *Teague*, Bayl. 574, 6th ed.; 2 East, P. C. 79, S. C.

(*n*) *Reed* v. *Deere*, 7 B. & C. 261; see *Swears* v. *Wells*, 1 Esp. 317.

first, and the drawer and acceptor signed the second bill, and then the acceptor's son drew a line through the acceptance on the first bill: it was held, in an action on the first bill by the drawer against the acceptor, that the second bill could not be submitted to the jury for the purpose of enabling them to judge whether the cancelling of the original acceptance were with the assent of the plaintiff (*o*).

Fresh dies.

The 3 & 4 Will. 4, c. 97, ss. 16 and 17, empowers the commissioners of stamps from time to time to change the dies on giving proper notice. A bill or note stamped with a superseded die is to be considered as unstamped. This objection need not be pleaded (*p*). A bill accepted in blank on a proper die, but filled up after the die is changed, is void (*q*).

Effect of post stamping against law.

Though the commissioners are in general prohibited, by the 31 Geo. 3, c. 25, s. 19, from stamping any bill or note after it has been made, yet, if so stamped, it may nevertheless be valid in the hands of an indorsee (*r*). Lord Kenyon observed "that though the commissioners might have exceeded their duty in stamping a bill against the positive directions of the act of parliament, still, that being stamped, he thought it was become a valid instrument, and a Judge at *Nisi Prius* could not inquire how and at what time it was stamped. Much inconvenience might arise, and a great check be put upon paper credit, if the objection was to be allowed; for how was it possible for a man, taking a bill in the ordinary course of business, to know whether it had been stamped previous to the making of it or not." The authority of the preceding case has been recognized in a later case (*s*); but it is there intimated that the decision would have been different, had the plaintiff been the original party to the instrument, or had it carried on the face of it evidence that it was stamped after it came into the plaintiff's hands, or after it was issued. And it is conceived that if it can be distinctly shown, that the plaintiff, who sues on a

(*o*) *Sweeting* v. *Halse*, 9 B. & C. 365; 4 M. & Ry. 287, S. C. It was held in *Jones* v. *Ryder*, 4 M. & W. 32, that a promissory note improperly stamped could not be received in evidence to take a case out of the Statute of Limitations; and see *Holmes* v. *Mackrell*, 3 C. B., N. S. 789.

(*p*) *Dawson* v. *McDonald*, 2 M. & W. 26.

(*q*) *Abrahams* v. *Skinner*, 12 A. & E. 763.

(*r*) *Wright* v. *Riley*, Peake, 173; *Rodrick* v. *Hovill*, 3 Camp. 103; *Rapp* v. *Allnutt*, ibid. 106.

(*s*) *Green* v. *Davies*, 4 B. & C. 235; 6 D. & R. 306, S. C. As to post stamping a cognovit, see *Rose* v. *Tomlinson*, 3 Dowl. 49.

CHAPTER IX.

bill, became the holder while it was unstamped, he cannot recover on it.

Reservation of interest does not make a larger stamp necessary.

The reservation of interest on a bill or note does not, in any case, make a larger stamp necessary; for the object of the Legislature was to impose a *pro ratâ* stamp duty on the sum actually due at the time of taking the security, and not upon what might become due in future for the use of the money (*t*). Although interest be reserved from a day prior to the date of the instrument (*u*).

Nor post dating.

Though post dating a bill, so as to evade the proper duty, subjects, as we have seen, to a heavy penalty, yet, if it be thus post dated, it will not require the higher stamp (*x*), for the word "date" in the Stamp Act (55 Geo. 3, c. 184, sched.) means the date expressed on the face of the bill.

On instruments which are in law agreements.

An instrument, which in point of law is but an agreement, and not one of that class of agreements, which, as irregular instruments approaching the form of bills and notes, are chargeable with a different duty, requires, where the matter thereof is of the value of 5*l.*, a stamp of 6*d.* only (*y*).

An agreement requiring, when made, a stamp of 1*l.* or 2*s.* 6*d.* (*z*), may afterwards, on payment of the penalty, be well stamped with the stamp now in force (*a*).

A note, reciting that deeds had been deposited as a security, does not, as a note, require a mortgage stamp (*b*).

Sufficiency of stamp admitted by paying money into court.

After payment of money into Court on the whole declaration, it was formerly held that the defendant could not object to the insufficiency of the stamp (*c*). This point can scarcely arise in the superior Courts since the New Rules of Pleading.

When the objection to the stamp should be taken.

The objection to the want of a stamp should in general be taken before the instrument is read. But where the defect

(*t*) *Pruessing* v. *Ing*, 4 B. & Ald. 204.

(*u*) *Wills* v. *Noot*, 4 Tyrw. 726.

(*x*) *Upstone* v. *Marchant*, 2 B. & C. 10; 3 D. & R. 198, S. C.; *Peacock* v. *Murrell*, 2 Stark. 558; *Williams* v. *Jarrett*, 5 B. & Ad. 32; 2 N. & M. 49, S. C.; *Duck* v. *Braddyll*, M'Clel. 235; *Whistler* v. *Foster*, 14 C. B., N. S. 248; *Austin* v. *Bunyard*, 34 L. J. 217, Q. B.

(*y*) 55 Geo. 3, c. 184; 7 Vict. c. 21; 13 & 14 Vict. c. 97; 23 Vict. c. 15.

(*z*) 13 & 14 Vict. c. 97, sched.

(*a*) *Buckworth* v. *Simpson*, 1 C., M. & R. 834; *Doe* v. *Whittingham*, 4 Taunt. 20; *Deakin* v. *Pennial*, 17 L. J., C. P. 217; 2 Exch. 320, S. C.

(*b*) *Fancourt* v. *Thorne*, 9 Q. B. 312.

(*c*) *Israel* v. *Benjamin*, 3 Camp. 40.

requires extrinsic evidence to show it, as where a check has been post dated, the instrument is to be shown to the judge, and the ground of objection afterwards proved (*d*). If a judge at *Nisi Prius* rule against a stamp objection, his decision cannot be reviewed (*e*), and he ought not to reserve the point (*f*).

Pleading.

The absence of a stamp on a bill or note cannot be pleaded, unless the plea show that the instrument cannot be made good by being stamped before the trial (*g*).

(*d*) *Field* v. *Woods*, 7 Ad. & El. 114; 2 Nev. & P. 117, S. C.

(*e*) 17 & 18 Vict. c. 125, s. 31.

(*f*) *Siordet* v. *Kuczinski*, 17 C. B. 251. But see *Eames* v. *Smith*, 1 Jur., N. S. 1025.

(*g*) *Bradley* v. *Bardsley*, 15 L. J., Exch. 115; 3 D. & L. 476; 14 M. & W. 873, S. C.; see, however, *Lazarus* v. *Cowie*, 3 Q. B. 465; *Tattersall* v. *Fearnley*, 17 C. C. 368.

CHAPTER X.

OF THE CONSIDERATION.

Presumption as to Considerations on Bills and Notes. 118
When it must be proved . 119
In the Case of an Accommodation Bill . . 119
Effect of New Rules of Pleading . . . 121
Ambiguity of the Expression "bonâ fide *Holder for Value*" 121
Distinction between Holder without Value and Holder with Notice . . . 121
Burthen of Proof in the Case of alleged Holder without Value . . . 122
In case of alleged Holder with Notice . . . 122
Proof of Notice. . . 123
Plaintiff standing on prior Title 123
What amounts to Notice . 123
Explicit Notice. . . 123
Implicit Notice. . . 123
Abstinence from Inquiry . 123
Gross Negligence not equivalent to Notice . . 124
Notice to an Agent . . 124
Gift of a Bill or Note . 124
Nature of the Consideration 125
Pre-existing Debt . . 125
Fluctuating Balance. . 126
Debt of a third Person . 126
A Judgment Debt . . 127
Compromise of a Claim . 127
Moral Obligation . . 127
Cases where more than one Consideration comes in Question . . . 128
Failure of Consideration . 129
Notice of Absence of Consideration . . . 129
Accommodation Bill. . 129
Partial Absence, or Failure of Consideration . . 130
FRAUD 131
Bills and Notes in Fraud of Third Persons . . 132
Where a Party who has been defrauded must pay a Bill or Note, signed by him, without Consideration 134
ILLEGAL CONSIDERATIONS AT COMMON LAW. . 135
Immoral 135
In Contravention of Public Policy 136
ILLEGAL OR VOID BY STATUTE 138
Usury 138
Gaming 138
Horse-racing . . . 139
Innocent Indorsee . . 139
New Security . . . 140
Stock-jobbing . . . 140
Other Considerations illegal by Statute . . . 142
Notice of Fraudulent or Illegal Consideration . 144
Illegality of Consideration where Judgment recovered 144
Part Consideration . . 144
Renewal of Bill given on illegal Consideration . 144

CHAPTER X.

Presumption as to consideration on bills and notes.

IF a man seek to enforce a simple contract, he must, in pleading, aver that it was made on good consideration, and must substantiate that allegation by proof. But to this rule bills and notes are an exception. It is never necessary to

aver consideration for any engagement on a bill or note, or to prove the existence of such consideration, unless a presumption against it be raised by the evidence of the adverse party, or unless it appear that injustice will be done to the defendant, or that the law will be violated, if the plaintiff recover. In the case of other simple contracts, the law presumes that there was no consideration till a consideration appear; in the case of contracts on bills or notes, a consideration is presumed till the contrary appear, or at least appear probable (*a*).

When it must be proved.

The defendant is not permitted to put the plaintiff on proof on the consideration which the plaintiff gave for the bill, unless the defendant can make out a *primâ facie* case against him, by showing that the bill was obtained from the defendant, or from some intermediate party, by undue means, as by fraud, or force (*b*), or that it was lost, or that it was originally infected with illegality (*c*).

In the case of an accommodation bill.

It was formerly held, that the defendant could call on the plaintiff to prove consideration, by showing the bill to be an accommodation bill, or that the defendant received no value (*d*). But it is now definitively settled, after consider-

(*a*) To obtain the usual decree in a creditor's suit it is not sufficient for the plaintiff to put in an acceptance of the testator proved as an exhibit. *Quære*, whether any evidence should be given of the consideration. *Keaton* v. *Lynch*, 1 Y. & Col., N. S. 437. And where an account is directed by a Court of Equity to be taken of dealings between an attorney and his client, it is not sufficient that the attorney produce bills and notes given by the client to him, he must prove the consideration. *Jones* v. *Thomas*, 2 Y. & Col. 498.

(*b*) As to a note obtained by duress of goods, see *Kearns* v. *Durell*, 6 C. B. 596. The distinction seems to be between a *payment*, or a transaction in the nature of payment, which is void for duress of goods, and a *contract* which cannot be so avoided. As to compulsion in the nature of duress of land, see *Close* v. *Phipps*, 7 M. & G. 586. See also *Atkinson* v. *Denby*, 30 L. J., Exch. 361; 7 N. & N. 934, S. C.

(*c*) *Harvey* v. *Towers*, 6 Exch. 656; *Mather* v. *Lord Maidstone* 26 L. J., C. P. 58; 1 C. B., N. S. 273, S. C. But a wager which is not prohibited but only void under 8 & 9 Vict. c. 109, has been held not to be such an illegality of consideration as will change the burthen of proof. *Fitch* v. *Jones*, 5 E. & B. 238.

(*d*) See *Heath* v. *Sansom*, 2 B. & Ad. 291; *Duncan* v. *Scott*, 1 Camp. 100; *Grant* v. *Vaughan*, 3 Burr. 1516; *King* v. *Milsom*, 2 Camp. 5; *Paterson* v. *Hardacre*, 4 Taunt. 114; *Thomas* v. *Newton*, 2 C. & P. 606; *De la Chaumette* v. *Bank of England*, 9 B. & C. 208; *Bassett* v. *Dodgin*, 10 Bing. 40; 3 M. & Scott, 417, S. C.; *Simpson* v. *Clarke*, 2 C., M. & R. 342; 1 Gale, 237, S. C. It was formerly necessary, in order to enable the defendant to put the plaintiff on proof of consideration, that the defendant should have given the plaintiff notice to prove

CHAPTER X.

ation by all the judges, that mere absence of consideration received by the defendant will not entitle him to call on the plaintiff to prove the consideration which the plaintiff gave. "There is," says Lord Abinger, delivering the judgment of the Court of Exchequer, "a substantial distinction between bills given for accommodation only, and cases of fraud, inasmuch as in the former case it is to be presumed that money has been obtained upon the bill. If a man comes into Court without any suspicion of fraud, but only as the holder of an accommodation bill, it may fairly be presumed that he is a holder for value. The proof of its being an accommodation bill is no evidence of the want of consideration in the holder. If the defendant says, "I lent my name to the drawer for the purpose of his raising money upon the bill, the probability is that money was obtained upon the bill." Unless, therefore, the bill be connected with some fraud, and a suspicion of fraud be raised from its being shown that something has been done with it of an illegal nature, as that it has been clandestinely taken away, or has been lost or stolen, (in which cases the holder must show that he gave value for it,) the *onus probandi* is cast upon the defendant" (*e*).

consideration. *Paterson* v. *Hardacre*, 4 Taunt. 114; Bayley, 6th ed. 474, 500. It is now, however, settled, that notice to prove consideration is not necessary; *Mann* v. *Lent*, 1 M. & M. 240; 10 B. & C. 877. S. C.; *Heath* v. *Sansom*, 2 B. & Ad. 291; *Bailey* v. *Bidwell*, 13 M. & W. 75; and it is now seldom given. It was, however, before the new rules, often prudent to give notice: "For it is," says Lord Tenterden, "matter of comment if no notice were given, or if it were not given at a reasonable time." *Mann* v. *Lent*, 1 M. & M. 240; 10 B. & C. 877, S. C. It was formerly held, that where the consideration given by the plaintiff was disputed, and a notice to that effect had been given, the plaintiff must go into his whole case in the first instance, and could not reserve the proof of consideration as an answer to the defendant's case. *Delauney* v. *Michell*, 1 Stark. 439; *Humbert* v. *Ruding*, Chitty, 9th ed. 651; *Spooner* v. *Gardiner*, R. & M., N. P. C. 86; Best, C. J., in C. P. But now, in all the Courts, the plaintiff is allowed to prove the handwriting and make out a *primâ facie* case, and afterwards, in answer to the defendant's case, to prove consideration. R. & M. 255, n. If, however, he call witnesses to prove the consideration in the first instance, he will not be allowed, after the defendant's case has closed, to call other witnesses for the same purpose. See *Browne* v. *Murray*, R. & M. 254.

(*e*) *Mills* v. *Barber*, 1 M. & W. 425; 5 Dowl. 77; 2 Gale, 5, S. C. *Percival* v. *Frampton*, 2 C., M. & R. 180; 3 Dowl. 748; *Whittaker* v. *Edmunds*, 1 M. & R. 366; 1 Ad. & E. 638, S. C.; *Jacob* v. *Hungate*, 1 M. & R. 445; *Clarke* v. *Holmes*, 2 F. & F. 75. It has been held by the Court of Exchequer that a mere *admission on record* is not sufficient to put the plaintiff on proof that he is a holder for value, but that the presumption against his title must be raised by evidence before the jury. *Edmonds* v. *Groves*, 2 M. & W. 642; 5 Dowl. 775, S. C.; and see *Smith* v. *Mar-*

We shall hereafter see that to an action against the accommodating party it is no defence that the plaintiff, a transferee for value, had notice that the bill was an accommodation bill, and even took it after it was due (*f*).

Effect of the new rules of pleading.

If the defendant plead that the note was made on an illegal consideration, and that the plaintiff gave no value, and the plaintiff put the whole plea in issue, it will be sufficient for the defendant to prove the illegality, which will cast on the plaintiff the burthen of proving consideration (*g*). And in a case of fraud the defendant will equally cast the burthen of proving consideration on the plaintiff by proving so much of the plea as alleges that he, the defendant, was defrauded of the bill (*h*).

But the defendant is in all cases at liberty to show affirmatively, by his own witnesses, absence or failure of consideration, where on the issues raised that would be a defence.

Ambiguity of the expression "*bonâ fide* holder for value."

The common phrase, "*bonâ fide holder for value*," is a very loose and ambiguous expression. It may either mean a holder for real value in contradistinction to a holder for apparent or pretended value, or it may mean a holder not only for real value, but also without notice of any fraud, illegality, or other vice, affecting the title to the bill. The former, that is to say, a holder for real value, with or without notice, is the correct sense of the expression (*i*). For a man may really give part or the whole value for a bill, though he have full notice of the fraud or illegality of the original consideration (*k*). He may think that the vice in the original concoction of the bill cannot be proved, or will not be set up as a defence, or he may rely on the solvency of other parties to the instrument.

Distinction between holder without value and holder with notice.

The ambiguity will be avoided, if we divide the subsequent holders of negotiable instruments vitiated by ille-

tis, 9 M. & W. 304; *Fearn* v. *Filica*, 7 M. & G. 513. The court of Queen's Bench, however, have held otherwise. *Bingham* v. *Stanley*, 1 G. & D. 237; 2 Q. B. 117, S. C.; *Robins* v. *Maidstone*, 4 Q. B. 815.

(*f*) See post, and Chapter XI.

(*g*) *Bailey* v. *Bidwell*, 13 M. & W. 73. And see *Harvey* v. *Towers*, 6 Exch. 656.

(*h*) Ibid.; but see *Brown* v. *Philpot*, 2 M. & Rob. 285, overruled, however, by *Smith* v. *Braine*, 20 L. J., Q. B. 204; 16 Q. B. 244, S. C.; *Berry* v. *Alderman*, 23 L. J., C. P. 35; 14 C. B. 95, S. C.; *Hall* v. *Featherstone*, 27 L. J., Exch. 309; 3 H. & N. 284, S. C.

(*i*) See *Uther* v. *Rich*, 10 Ad. & E. 784.

(*k*) See the observation of Alderson, B., in *Smith* v. *Martin*, 9 M. & W. 307.

CHAPTER X.

gality, statutable invalidity (*l*), or fraud, into two classes; first, transferees without value, and, secondly, transferees with notice.

Burthen of proof in the case of alleged holder without value.

The distinction is important, because the burthen of proof in the two cases is different.

As soon as it appears to the jury by the defendant's evidence that the bill was originally infected with fraud, invalidity or illegality, then it is plain that, the original holder's title being destroyed, the title of every subsequent holder, which reposes on that foundation and no other, falls with it. Hence it appears that the plaintiff, the transferee, can then have no title till he shows that he, or some other holder under whom he claims, has given value for the bill (*m*). Therefore, where the question is thus raised, whether the transferee be a holder for value, it is not for the defendant to prove the absence of value, but for the plaintiff, the transferee, to prove value given either by himself or by some one under whom he claims (*n*).

Burthen of proof in case of alleged holder with notice.

But it is otherwise when the question is raised whether the plaintiff, the transferee, had notice of the original illegality or fraud. For he having shown, or it being admitted or undisputed, that he or his predecessor in title gave value, he has a new and independent title. And though possible, it is not likely, that notice of the original fraud or illegality would be communicated to subsequent holders. If, therefore, the defendant seek to impeach this new title by alleging notice of the fraud or illegality, it is for him to prove it (*o*). The averment, that the plaintiff had notice of the fraud or the illegality, is not only in form but in substance an affirmative allegation, and the maxim applies, "*Ei incumbit probatio qui dicit*" (*p*). Besides, until the recent alteration in the law, allowing the plaintiff to be examined as a witness on his own behalf, it might have been impossible for the plaintiff to prove the negative. Lastly, fraud, or which is

(*l*) *e. g.*, a gaming contract.

(*m*) *Smith* v. *Martin*, 9 M. & W. 304; *Bailey* v. *Bidwell*, 13 M. & W. 73; *Harvey* v. *Towers*, 6 Exch. 656.

(*n*) *Hogg* v. *Skeen*, 34 L. J., C. P. 155.

(*o*) *Goodman* v. *Harvey*, 4 Ad. & E. 870. See the observation of Parke, B., in *Bailey* v. *Bidwell*, 13 M. & W. 75; *Oakeley* v. *Oddeen*, Guildhall, M. T. 1861. So held at the second trial of this last case, in conformity with the opinion of the majority of the Court of Common Pleas, who had previously granted a new trial on other grounds, 2 F. & F. 656.

(*p*) So where the defendant alleges that the plaintiff took the bill after it was due, it lies on the defendant to prove it. (See the Chapter on TRANSFER.)

the same thing, participation in a fraud, is never to be presumed without proof, but, nevertheless, the proof need not be direct, it may be indirect and circumstantial.

Proof of notice.

But absence of consideration moving from the plaintiff, proved by the defendant, or otherwise affirmatively established, may in some cases be *primâ facie* evidence of notice to the plaintiff of fraud or illegality.

Plaintiff may stand on a prior title.

Although notice to the plaintiff himself be established, that alone will not destroy his right to recover, if he can make a further independent title under any intermediate holder who gave value, and had not notice.

What amounts to notice.

Notice of illegality or fraud is either particular or general.

Particular or explicit notice.

Particular or *explicit* notice is where the holder had notice of the particular facts avoiding the bill. But notice of the facts more or less in detail is not necessary in order to invalidate his title. It is sufficient if he had general notice.

General or implicit notice.

General or *implicit* notice is where the holder had notice that there was *some* illegality or *some* fraud vitiating the bill, though he may not have been apprised of its precise nature. Thus, if when he took the bill he were told in express terms that there was something wrong about it, without being told what the vice was, or if it can be collected by a jury from circumstances fairly warranting such an inference, that he knew, or believed, or thought, that the bill was tainted with illegality or fraud, such a general or implicit notice will equally destroy his title (*q*).

Abstinence from inquiry.

A wilful and fraudulent abstinence from inquiry into the circumstances (*r*), where they are known to be such as to invite inquiry, will (if a jury think that the abstinence from inquiry arose from a belief or suspicion that inquiry would disclose a vice in the bill) amount to general or implicit notice (*s*).

(*q*) *Oakeley* v. *Ooddeen*, Guildhall, C. P., November, 1861.

(*r*) And it has even been said by the Court of Queen's Bench, that gross negligence may be *evidence* of fraud. *Goodman* v. *Harvey*, 4 Ad. & E. 870.

(*s*) *Oakeley* v. *Ooddeen*, Ibid., and see *Jones* v. *Smith*, 1 Hare, 55; *Ware* v. *Lord Egmont*, 4 De G., M. & G. 478; *Attorney-General* v. *Stephens*, 6 De G., M. & G. 111.

CHAPTER X.

Gross negligence not equivalent to notice.

But mere negligence, however gross, not amounting to wilful and fraudulent blindness and abstinence from inquiry, will not of itself amount to notice, though it may be evidence of it (*t*).

Notice to an agent.

Where the holder in taking the bill employs an agent, though the principal be unaffected with notice to himself personally, yet notice to the agent so employed, whether explicit or implicit, is notice to his principal the holder (*u*). Perhaps, however, the rule may be subject to this qualification, that the knowledge of the agent, in order to affect his principal, must either have been acquired by the agent in the same transaction, or at least so recently as that it may be presumed to remain in his memory; and it must be knowledge of a fact material to the transaction, and which it would be the duty of the agent to communicate to his principal (*x*). The effect of notice to an agent, commonly called constructive notice, is not to be extended (*y*).

But wherever the agent's conduct amounts to fraud, it is conceived that the innocent principal who takes the benefit of the agent's fraudulent act is civilly responsible for the agent's fraud (*z*).

Gift, *inter vivos*, of a bill or note.

It would seem, on general principles, that the payment of no bill of exchange, promissory note or check, given by the maker or acceptor to the payee, as a gift, *inter vivos*, can be enforced by action at the suit of the donee against the donor (*a*). Thus, where a bill of exchange was accepted by the defendant, as a present to the payee, who indorsed it to the plaintiff for a small sum advanced to him, Lord Ellenborough held, that the plaintiff was only entitled to recover so much as he had advanced on the bill (*b*). The effect of a gift of a negotiable instrument, payable to bearer, or indorsed by the donor in blank, should seem on principle to

(*t*) *Goodman* v. *Harvey*, supra.
(*u*) *Oakeley* v. *Ooddeen*, Ibid.
(*x*) *Wyllie* v. *Pollen*, 32 L. J. Ch. 782.
(*y*) Ibid.
(*z*) The rule of the civil law is conceived to be equally the rule of the English law, "*Procuratoris scientiam et dolum nocere debere domino, neque Pomponius dubitat neque nos dubitamus.*" Dig. 14, 4, 5. See *Cornfoot* v. *Fowke*, 6 M. & W. 373, and *Udell* v. *Atherton*, 30 L. J., Exch. 337, where the Court were equally divided. 7 H. & N. 172; *Eyn* v. *M'Dowell*, 14 Ir. C. C. Rep. 814.
(*a*) *Milnes* v. *Dawson*, 5 Exch. 948.
(*b*) *Nash* v. *Brown*, Chitty, 10th ed. 54; and see *Holiday* v. *Atkinson*, 5 B. & C. 501; 8 D. & R. 163, S. C.; *Easton* v. *Prachett*, 4 Tyrwh. 472; 1 C., M. & R. 798; 3 Dowl. 472; 1 Gale, 33, S. C., in error; 2 C., M. & R. 542; 1 Gale, 250; but see *Milnes* v. *Dawson*, 4 Exch. 948.

be this. As between the donor and the donee, the donor cannot recover the bill back or receive the amount from prior parties (*c*), but the donee himself cannot sue the donor upon it. As between the donee and the other prior parties to the bill, they are liable to him. If the bill be not transferable, or be payable to order and not indorsed, it is conceived that the effect of a gift of it is to vest the legal property in the paper and the beneficial interest in the money in the donee (*d*); who, however, must recover from prior parties in the donor's name.

Nature of the consideration.

The same general rules, as apply to the nature of the consideration for other simple contracts, are also applicable to the various contracts on a bill or note. It may suffice to observe here, for the sake of the unprofessional reader, that a consideration is, in general, either some detriment to the plaintiff, sustained for the sake or at the instance of the defendant, or some benefit to the defendant (*e*) moving from plaintiff. Natural affection is not a sufficient consideration to support a simple contract (*f*).

If a man give his acceptance to another that will be a good consideration for a promise, or for another bill or acceptance, though such first acceptance is, after all, unpaid (*g*). And, therefore, cross acceptances for mutual accommodation are respectively considerations for each other (*h*).

Pre existing debt.

A pre-existing debt due to the holder of a negotiable instrument is a good consideration, and it should seem is equivalent to a fresh advance (*i*). At all events where the bill or note is payable at a future time, it places the holder in the same situation as if he had made fresh advances on

(*c*) *Milnes* v. *Dawson*, 5 Exch. 948.

(*d*) See *Barton* v. *Gainer*, 27 L. J., Exch. 390; 3 H. & N. 387, S. C., as to the effect of a gift of a specialty.

(*e*) It is not necessary that the consideration should move to the defendant personally; if it moves to a third person by his desire or acquiescence, that is sufficient. Therefore, the debt of a third person is a good consideration to support a contract on a bill payable at a future day. *Sowerby* v. *Butcher*, 2 C. & M. 368; 5 Tyr. 320, S. C.; vide post. Past gratuitous services and future services which the payee was under no contract to render, do not form a sufficient consideration for a note. *Hulse* v. *Hulse*, 17 C. B. 711.

(*f*) *Holiday* v. *Atkinson*, 5 B. & C. 501.

(*g*) *Rose* v. *Sims*, 1 B. & Ad. 521.

(*h*) *Cowley* v. *Dunlop*, 7 T. R. 565; *Buckler* v. *Buttivant*, 3 East, 72; *Rose* v. *Sims*, 1 B. & Ad. 521.

(*i*) Story on Bills of Exchange, s. 192.

CHAPTER X.

the instrument (*k*); for the remedy for the previous debt is suspended till maturity of the bill or note (*l*).

Fluctuating balance.

A fluctuating balance may form a consideration for a bill (*m*). Where a banker's acceptances for his customer exceeded the cash balance in his hands, and accommodation acceptances were deposited by the customer with the banker as a collateral security, it was held, that, whenever the acceptances exceeded the cash balance, the bankers held the collateral bills for value (*n*). Where bills or notes are deposited as a security for the balance of an account current, the successive balances form a shifting consideration for the bill. Thus, where A. and Co. bankers in the country, being pressed by the plaintiffs B. and Co., bankers in town, to whom they are indebted, to send up any bills that they can procure, transmit for account an accommodation bill accepted by the defendant; when the bill becomes due the balance is in favour of A. and Co., but the bill is not withdrawn, and afterwards the balance between the houses turns considerably in favour of B. and Co., the plaintiffs, and is so when A. and Co. become bankrupts, B. and Co. are entitled to recover against the defendant, the accommodation acceptor (*o*).

Debt of a third person.

A subsisting debt due from a third person is a good consideration for a bill or note (*p*) payable at a future day;

(*k*) See *Percival* v. *Frampton*, 2 C., M. & R. 180; 3 Dowl. 748, S. C.; *Foster* v. *Pearson*, 1 C., M. & R. 849; 5 Tyr. 255, S. C.; but see *De la Chaumette* v. *Bank of England*, 9 B. & C. 208; *Vallance* v. *Siddel*, 6 Ad. & E. 932; 2 N. & P. 78, S. C.; *Poirier* v. *Morris*, 1 E. & B. 103; see *In re Carew*, 31 Beav. 39.

(*l*) In America the judicial decisions on this important point vary in different States. But the SUPREME COURT of the United States has gone the full length of holding that the taker of a note for a pre-existing debt has all the rights of a holder for a new consideration. *Swift* v. *Tyson*, 16 Peters, 1. See the state of the American authorities, Byles on Bills, 5th American edition, pp. 229 to 233.

(*m*) *Pease* v. *Hirst*, 10 B. & C. 122; 5 M. & Ry. 99, S. C.; *Collenridge* v. *Farquharson*, 1 Stark. 259; *Richards* v. *Macey*, 14 M. & W. 484; and for a bond, *Honniker* v. *Wigg*, 4 Q. B. 792; and see *Cholmley* v. *Darley*, 14 M. & W. 844.

(*n*) *Bosanquet* v. *Dudman*, 1 Stark. 1; and see *Bolland* v. *Bygrave*, 1 R. & M. 271.

(*o*) *Atwood* v. *Crowdie*, 1 Stark. 483; see *Woodroffe* v. *Hayne*, 1 Car. & Payne, 600.

(*p*) *Popplewell* v. *Wilson*, 1 Stra. 264; *Coombs* v. *Ingram*, 4 D. & R. 211; *Sowerby* v. *Butcher*, 2 C. & M. 372; 4 Tyr. 320, S. C.; *Garnet* v. *Clarke*, 11 Mod. 226; *Ridout* v. *Bristow*, 1 C. & J. 231; 1 Tyr. 84, S. C.; *Wilders* v. *Stevens*, 15 L. J., Exch. 108; 15 M. & W. 208, S. C.; and see *Lechmere* v. *Fletcher*, 1 C. & M. 623; *Baker* v. *Walker*, 14 M. & W.

and so is a debt due from the defendant and a third person (*q*). If the debt of the third person is extinguished by the bill or note being taken in satisfaction, there is a good consideration, though the instrument be payable on demand.

A judgment debt. A judgment debt is a good consideration for a note payable at a future day; for it imports an agreement on the part of the judgment creditor to suspend proceedings on the judgment till the maturity of the note (*r*).

Compromise of a claim. The compromise of a claim, though really unfounded and believed to be so by the party against whom it is made, may be a good consideration for a promissory note (*s*).

Moral obligation. A moral obligation is in general insufficient, but may, in some cases, be a consideration for a bill or note, as where there once existed a legal liability, though it may have been barred by statute (*t*). "*Quisque renunciare potest juri pro se introducto.*" Thus, for example, where a bankrupt, after his bankruptcy, gave a promissory note to the plaintiff, one of his creditors, for part of his debt, it was held that the note was given on a good consideration (*u*). And a note given by the purchaser of an estate to the vendor for the purchase-money, though the contract be void by the Statute of Frauds, is made on sufficient consideration (*x*).

465; *Walton* v. *Mascall*, 14 L. J., Exch. 54; 13 M. & W. 453, S. C.; *Cook* v. *Long*, Car. & M. 510. At least, if the note be payable at a future day, for then the note amounts to an agreement to give time to the original debtor, and that indulgence to him is a consideration to the maker. *Balfour* v. *Sea Fire and Life Insurance Company*, 3 C. B., N. S. 300. *Secus*, if the original debtor is dead and has no representative. *Nelson* v. *Serle*, 4 M. & W. 795; reversing *Serle* v. *Waterworth*, 4 M. & W. 9; 6 Dowl. 684, S. C. But if the note be payable immediately, it is conceived that the pre-existing debt of a stranger could not be a consideration, unless it were taken in satisfaction, or unless credit had been given to the original debtor at the maker's request. *Crofts* v. *Beale*, 11 C. B. 172, acc.

(*q*) *Heywood* v. *Watson*, 4 Bing. 496; 1 M. & P. 268, S. C.

(*r*) *Baker* v. *Walker*, 14 M. & W. 465.

(*s*) *Cooke* v. *Wright*, 30 L. J., Q. B. 321. *Callender v Rischoffsheim* L. R. 5 233 449.

(*t*) See the note to *Wennall* v. *Adney*, 3 B. & P. 249; *Eastwood* v. *Kenyon*, 11 Ad. & E. 438.

(*u*) *Trueman* v. *Fenton*, Cowp. 544; and see *Brix* v. *Braham*, 1 Bing. 281; 8 Moore, 261, S. C.

(*x*) *Jones* v. *Jones*, 6 M. & W. 84. Perhaps this case may be rested on another ground.

A majority of the Court of Exchequer have recently held that a bill given since the repeal of the usury laws to repay a debt with usurious interest contracted during the existence of the usury laws is binding. *Flight* v. *Reed*, 22 L. J., Exch. 265; 1 H. & C. 708, S. C.

CHAPTER X.

Cases where more than one consideration comes in question.

Between immediate parties—that is, between the drawer and acceptor, between the payee and drawer, between the payee and maker of a note, between the indorsee and indorser, the only consideration is that which moved from the plaintiff to the defendant, and the absence or failure of this is a good defence to an action. Thus, where a bill was drawn in the regular course of trade, and delivered to the payee's agent, before the consideration was given, and the payee's agent, who was to have paid the consideration, failed, the payee could not recover against the drawer (*y*). But, between remote parties—for example, between payee and acceptor, between indorsee and acceptor, between indorsee and remote indorser, two distinct considerations, at least, must come in question: first, that which the defendant received for his liability; and, secondly, that which the plaintiff gave for his title. An action between remote parties will not fail unless there be absence or failure of both these considerations (*z*). And if any intermediate holder between the defendant and the plaintiff gave value for the bill, that intervening consideration will sustain the plaintiff's title (*a*).

Thus it is no defence to an action by an indorsee for value against an acceptor, that the acceptor received no value (*b*). Nor on the other hand, that though the acceptor received value, the indorsee gave none. On the same principle, if the acceptance were without consideration, and the plaintiff, the indorsee, knew it, he, as a general rule, can recover no more than he gave for the bill (*c*); for, suppose the bill to be for 100*l.* and that the indorsee gave 60*l.* for it, if he

(*y*) *Puget de Bras* v. *Forbes*, 1 Esp. 117; *Astley* v. *Johnson*, 29 L. J., Exch. 161; 5 H. & N. 137, S. C., where it was held that, a promise to give consideration in money at a specified future time having been broken, parties liable on the bill have a right to treat the payment of money as the consideration, and not the *promise to pay it*. *Jeffries* v. *Austen*, 1 Stra. 674; *Jackson* v. *Warwick*, 7 T. R. 121. In *Munroe* v. *Bordier*, 19 L. J., C. P. 133; 8 C. B. 862, S. C., it seems to be held, that a payee who takes a bill *bonâ fide* for value from a person to whom the drawer had entrusted the bill, but who parts with it against his instructions, acquires a title.

Indeed, a payee, when he is a third person, seems to have the same title as the first indorsee of a bill payable to the drawer's own order. *Poirier* v. *Morris*, 2 E. & B. 89.

(*z*) *Robinson* v. *Reynolds*, 2 Q. B. 196; *Thiedemann* v. *Goldschmidt*, 1 De G., F. & J. 4. See *Agra and Masterman* v. *Leighton*, 36 L. J., Exch. 33; L. R., 2 Exch. 56, S. C., where an equitable plea stating facts amounting to a failure of both these considerations was held good.

(*a*) *Hunter* v. *Wilson*, 19 L. J., Exch. 8; 4 Exch. 489, S. C.

(*b*) *Collins* v. *Martin*, 1 Bos. & Pul. 651.

(*c*) *Wiffen* v. *Roberts*, 1 Esp. 261.

could recover 100*l.* from the acceptor, the acceptor having recovered that sum of the drawer, the drawer might recover back 40*l.* from the indorsee as money received to the drawee's use (*d*).

Failure of consideration.

The entire failure of the consideration has the same effect as its original and total absence. A. appointed B. his executor and gave him a promissory note, payable on demand, for 100*l.*, in consideration of the trouble he would have in the office of executor after A.'s death. B., however, died first; but his executors brought an action on the note against A. It was held, that, as the consideration for the note had totally failed, the action was not maintainable (*e*).

Notice of absence of consideration.

It is no defence to an action by an indorsee for value against an *accommodation* acceptor, who has received no consideration, that, at the time the plaintiff took the bill he knew the defendant had received no value (*f*); unless, indeed, the plaintiff took it of a person who held it for a particular purpose, and was therefore guilty of a breach of duty in transferring it to the plaintiff, and the plaintiff, at the time of taking it, was cognizant of the circumstances (*g*).

Accommodation bill, what it is.

An accommodation bill is a bill to which the accommodating party, be he acceptor, drawer, or indorser, has put his name, without consideration (*h*), for the purpose of benefiting or accommodating some other party, who desires to raise money on it and is to provide for the bill when due (*i*).

(*d*) *Jones* v. *Hibbert*, 2 Stark. 304. These observations do not apply to an accommodation acceptance, properly so called.

(*e*) *Solly* v. *Hinde*, 2 C. & M. 516; 6 C. & P. 316, S. C.; *Wells* v. *Hopkins*, 5 M. & W. 7.

(*f*) *Smith* v. *Knox*, 3 Esp. 47; *Charles* v. *Marsden*, 1 Taunt. 224; *Fentum* v. *Pococke*, 5 Taunt. 193; 1 Marsh, 14, S. C.; *Bank of Ireland* v. *Beresford*, 6 Dow. 237; and see *Poplewell* v. *Wilson*, 1 Stra. 264; and *Wiffen* v. *Roberts*, 1 Esp. 261; and see *Jewell* v. *Parr*, 16 C. B. 684; 36 L. J., Ex. 33; L. R., 2 Ex. 56.

(*g*) If a message be sent comprising facts, the communication of which would impugn the title to a bill, there is no presumption that the message was delivered: its delivery must be proved. *Middleton* v. *Barned*, 4 Exch. 241. See the Chapter on TRANSFER.

(*h*) As to his remedy for the costs of an action brought against him, see post, Chapter XXXIII.

(*i*) Bills drawn specifically, the one against the other, for the same amount, are not in this sense accommodation bills. See the Chapter on BANKRUPTCY. *Burden* v. *Benton*, 9 Q. B. 843; 16 L. J., Q. B. 353, S. C; see also *King* v. *Phillips*, 12 M. & W. 705.

CHAPTER X.

Liability of party accommodated.

A party who procures another to lend his acceptance, thereby engages either himself to take up the bill, or else within a reasonable time before the bill becomes due to provide the accommodation acceptor with funds for so doing, or, lastly, to indemnify the accommodation acceptor against the consequences of non-payment (*k*). And, therefore, where the drawer of a bill, accepted for his accommodation, a week before the bill became due, handed over bank notes to the accommodation acceptor, it was held that he could not himself revoke this payment, and therefore that his bankruptcy before the bill became due did not amount to a revocation (*l*).

The effect of indorsing or otherwise transferring an overdue accommodation bill, will be further considered hereafter in the chapter on TRANSFER.

Partial absence or failure of consideration.

Where a defendant can insist on a total want of consideration as a defence, he may also set up its partial absence or failure, as an answer *pro tanto*. Thus in an action by the drawer of a bill for 19*l.* 5*s.*, payable to his own order, against the acceptor, it appearing that the bill was accepted, for value as to 10*l.*, and as an accommodation to the plaintiff as to the residue, Lord Ellenborough held, "that although with respect to third persons the amount of the bill might be 19*l.* 5*s.*, yet as between these parties it was an acceptance to the amount of 10*l.* only" (*m*).

But the money as to which the consideration fails must be of a specific ascertained amount, for the jury cannot, in an action on a bill or note, assess by way of set-off the damages arising from a breach of contract, but the defendant must be left to his cross action. Drawer against the acceptor of a bill: the plaintiff agreed to let a house to the defendant for twenty-one years, and in consideration of 500*l.*, to be paid by three bills, to be drawn by the plaintiff and accepted by the defendant, agreed to execute a lease for that term. The bill in question, and two others, were drawn and accepted accordingly, and the defendant was immediately let into possession; but the plaintiff refused to execute the lease. It was argued, therefore, that the consideration had failed. But Lord Ellenborough, and afterwards the Court, on a mo-

(*k*) *Reynolds* v. *Doyle*, 1 M. & G. 758; 2 Scott, N. R. 45, S. C.

(*l*) *Yates* v. *Hoppe*, 9 C. B. 541. Had the payment been a fraudulent preference, it would of course have been otherwise.

(*m*) *Darnell* v. *Williams*, 2 Stark. 166; *Barber* v. *Backhouse*, Peake, 61; *Clarke* v. *Lazarus*, 2 M. & G. 167; 2 Scott, N. R. 391, S. C.; *Agra and Mastermans* v. *Leighton*, 36 L. J., Ex. 33; L. R., 2 Ex. 56.

tion for a new trial, held, that it was no defence to the action, that the defendant was bound to pay the bills and might have his remedy on the agreement for non-execution of the lease (*n*). Where the consideration for an acceptance was goods sold, and the vendor forcibly retook possession, the consideration was held not to have failed (*o*). So, where a bill or note is given for goods sold, or work done, the price, amount, and quality of the goods, or work, cannot be disputed in an action on the bill (*p*). So, where work had been done by the plaintiff for the defendant, for which the plaintiff charged the defendant 63*l.*, and the defendant paid the plaintiff 43*l.* in money, and gave him a bill for the remaining 20*l.*; it is no defence to an action by the plaintiff against the defendant on the bill that the work done was not worth 43*l.* (*q*).

And, where the amount for which the consideration fails is unliquidated, a bill in equity for an injunction to restrain an action on the bill of exchange and for an account cannot be maintained (*r*).

FRAUD.

FRAUD is an artifice to deceive and injure.

Fraud avoids every contract and every act. "Fraud," says the Lord Chief Baron, "cuts down everything. The law sets itself against fraud to the extent of breaking through almost every rule, sacrificing every maxim, getting rid of every ground of opposition. The law so abhors fraud that it will not allow technical difficulties of any kind to interfere to prevent the success of justice and truth" (*s*).

If the consideration for a bill can be shown to be vitiated by fraud, of which the defendant was ignorant when he gave the bill, *and*, if the defendant has derived no benefit from the contract, but has elected to repudiate it as soon as he knew of the fraud, he has a defence to an action on the bill at the suit of the party to whom he gave it (*t*). Defendant

(*n*) *Moggeridge* v. *Jones*, 14 East, 486; 3 Camp. 38, S. C.; *Spiller* v. *Westlake*, 2 B. & Ad. 155; *Mann* v. *Lent*, 10 B. & C. 877; *Grant* v. *Welchman*, 16 East, 207; *Cuff* v. *Browne*, 5 Price, 297.

(*o*) *Stephens* v. *Wilkinson*, 2 B. & Ad. 320; see also *Jones* v. *Jones*, 6 M. & W. 84; and *Lomas* v. *Bradshaw*, 19 L. J., C. P. 273; 9 C. B. 620, S. C.

(*p*) *Morgan* v. *Richardson*, 7 East, 482, n.; 3 Smith, 487, S. C.; *Tye* v. *Gwynne*, 2 Camp. 346; *Obbard* v. *Betham*, 1 M. & M. 483; *Warwick* v. *Nairn*, 10 Exch. 762.

(*q*) *Tricky* v. *Larne*, 6 M. & W. 278.

(*r*) *Glennie* v. *Imrie*, 3 Y. & C. 436.

(*s*) *Rogers* v. *Hadley*, 32 L. J., Exch. 248.

(*t*) *Mills* v. *Oddy*, 2 C., M. & R. 103.

CHAPTER X.

gave plaintiff a promissory note for some pictures. It was proposed to prove that the sum for which the note was given infinitely exceeded the value of the pictures. Lord Ellenborough—"I will not admit the evidence for the purpose of reducing the damages, by showing that the pictures were of an inferior value; but, if you can, by the inadequacy of the value, and other circumstances, prove fraud on the part of the plaintiff, so as to show that there was no *contract at all*, the evidence will be admissible: if it fall short of that, it will be unavailing" (*u*). So, if a horse is warranted, a check is given, and the horse turn out unsound, the breach of the warranty is no answer to an action on the check; but if the seller knew of the unsoundness, there is fraud; there was no contract, and no action lies on the check, at the suit of the seller (*x*), if the horse be tendered back. So, if by fraudulent representations a man induces another to give him for a business more than it is worth, and take a bill in payment, he cannot recover on the bill (*y*). So where the plaintiff had distrained goods of the defendant on the premises of the plaintiff's tenant, and the defendant, to get rid of the distress, accepted the bill in question, it appearing that there was no rent due at the time of the distress, Best, J., left it to the jury to say, whether the plaintiff had not falsely represented to the defendant that the rent was due, in order to induce him to give his acceptance, and that, if so, the acceptance was fraudulently obtained, and the defendant was entitled to a verdict (*z*).

Fraud at election.

But where the defendant insists on the fraud as a defence, he must altogether repudiate the contract, and retain no benefit under it (*a*).

Bills and notes in fraud of third persons.

Equally unavailing is the instrument, if it were given in fraud of third persons.

An insolvent proposed to compound with his creditors, but the plaintiffs, being creditors, refused to execute the

(*u*) *Solomon* v. *Turner*, 1 Stark. 51. But it is conceived that this ruling is wrong if the defendant kept the picture.

(*x*) *Lewis* v. *Cosgrave*, 2 Taunt. 2.

(*y*) *Archer* v. *Bamford*, 3 Stark. 175.

(*z*) *Grew* v. *Bevan*, 3 Stark. 134.

(*a*) *Archer* v. *Bamford*, supra; and see *Clarke* v. *Dixon*, E., B. & E. 148. As to PLEADING, see the Chapter on that subject. Yet the Court of Exchequer have held, that a plea of fraud to an action for goods sold and delivered is good. *Lawton* v. *Elmore*, 27 L. J., Exch. 141. For goods may be sold and delivered, e. g., under a written contract, and yet not accepted.

deed of composition, unless the insolvent gave them a promissory note for the residue of his debt to them. He accordingly did so, without the knowledge of the other creditors, and the plaintiffs and the rest of the creditors then signed the composition deed. The note was held void, as a fraud on the other creditors (*b*). But if the insolvent pay the bill or note when due to the holder, he cannot recover back from the creditor the money so paid (*c*). And the note is equally void, if given, not by the insolvent, but by a third person. So, the note, being given with a fraudulent intention, would have been void, though the composition had never been effected (*d*). And any better security than the other creditors have, though for the same amount, if taken without their knowledge, is void as a fraud on them. "The real question is," says Le Blanc, J., "whether one creditor be put in a better situation than he stipulated for with the other creditors, and it is immaterial whether that be done by receiving more money, or that which is meant to procure him more money, namely, a better security for the same sum" (*e*).

In these cases the creditor and the insolvent, though "*particeps criminis*," are not "*in pari delicto*." It is oppression on one side and submission on the other. "It can never," says Lord Ellenborough, "be *par delictum* when one holds the rod and the other bows to it" (*f*).

A compounding creditor cannot split his demand, and compound for part, and afterwards sue for the residue, unless he acquaint the other creditors with his proceeding. Therefore, where the plaintiff held two bills, drawn by the insolvent, both due, one for 400*l.*, the other for 156*l.* 19*s.* 10*d.*; and expecting that the acceptor would pay the first, inserted in the schedule attached to the composition deed the amount of the second only as his debt, it was decided that he could not afterwards sue the insolvent on the first bill (*g*). So, if

(*b*) *Cockshott* v. *Bennett*, 2 T. R. 763; *Knight* v. *Hunt*, 5 Bing. 432; 3 M. & P. 18, S. C.; *Bryant* v. *Christie*, 1 Stark. 329; and see *Took* v. *Tuck*, 4 Bing. 224; 13 Moore, 435.

(*c*) *Wilson* v. *Ray*, 10 Ad. & E. 82; 2 Per. & Dav. 253, S. C., overruling *Turner* v. *Hoole*, 1 D. & R., N. P. C. 27.

(*d*) *Wells* v. *Girling*, 1 B. & B. 447; 3 Moore, 79, S. C.

(*e*) *Leicester* v. *Rose*, 4 East, 372, overruling *Feise* v. *Randall*, 6 T. R. 146.

(*f*) *Smith* v. *Cuff*, 6 M. & S. 160; *Smith* v. *Bromley*, 2 Doug. 695, 697; *Atkinson* v. *Denby*, 30 L. J., Exch. 361; 31 L. J. 362, S. C. in error. The money paid at the time may be recovered back. But if a bill be given afterwards and voluntarily paid, it has been held that the money cannot be recovered back. *Wilson* v. *Ray*, 10 Ad. & E. 82.

(*g*) *Britten* v. *Hughes*, 5 Bing. 460; 3 M. & P. 77, S. C., overruling, perhaps, *Payler* v. *Homersham*, 4 M. & Sel. 423; and see

CHAPTER X.

the agreement of composition contain a stipulation that all securities shall be given up, if the compounding creditor holds bills drawn by the defendant and accepted by a third person, and he afterwards receives the amount of these bills from the acceptor, he must refund the money to the insolvent (*h*). But he may retain money so received, if the agreement of composition contained no stipulation for the surrender of securities (*i*). A creditor who holds a bill, and accepts a composition, impliedly engages that the bill is in his own hands. If, therefore, an indorsee of the bill afterwards compels the compounding debtor to pay the bill, the latter may recover the amount from the compounding creditor as money paid to his use (*k*), unless the debtor made the payment voluntarily to a holder who was a mere agent of the original creditor, and known by the debtor to be so (*l*). If the creditors of an insolvent compound with him, and take notes of hand for the amounts of their respective compositions, and one creditor, in addition to his note of hand, fraudulently and clandestinely take a further security, his dealing with the insolvent is one entire transaction, and he cannot recover, even on the promissory note (*m*).

So, if a man becomes surety for another for the price of goods—as, for example, by joining him in a joint and several note, and the party to whom the surety is responsible conceals from him a stipulation for an additional sum, which it is secretly agreed between himself and the principal that the principal shall pay in liquidation of an old debt, that is a fraud on the surety, and releases him from his engagement (*n*).

Where a party who has been defrauded must pay a bill or note signed by him without consideration.

But where a fraud has been practised on the maker or acceptor, an indorsee for value without notice may, nevertheless, recover against him. Thus we have seen, that though a partner fraudulently use the names of his co-partners, they will all be bound to pay an innocent indorsee (*o*). So, in an action by the indorsee against the maker of a note

Holmes v. *Viner*, 1 Esp. 132; *Cecil* v. *Plaistow*, 1 Anst. 202. Not so where debtor omits bill from schedule; *Buvelot* v. *Mills*, L. R., 1 Q. B. 104.

(*h*) *Stock* v. *Mawson*, 1 B. & P. 286.

(*i*) *Thomas* v. *Courtnay*, 1 B. & Ald. 1.

(*k*) *Hawley* v. *Beverley*, 6 M. & G. 221.

(*l*) *Gibson* v. *Bruce*, 5 M. & G. 399.

(*m*) *Howden* v. *Haigh*, 11 Ad. & E. 1033; and see *In re Cross*, 4 De G. & S. 864.

(*n*) *Pidcock* v. *Bishop*, 3 B. & C. 605; 5 D. & R. 505, S. C. See these questions more fully discussed in the Chapter on PRINCIPAL AND SURETY.

(*o*) Ante, see PARTNERSHIP.

thirteen years old, the defendant obtained a rule *nisi* to set aside a judgment by default, on an affidavit that he the defendant was swindled out of the note. An affidavit being made on the other side, that the plaintiff took the note *bonâ fide*, and gave a valuable consideration for it, the Court held, that, *however improperly it might have been obtained*, a third person, who took it fairly and gave a consideration for it, was entitled to recover, and they discharged the rule (*p*). A., by false representations, induced B. to sign his name to a blank stamped paper, which A. afterwards secretly filled up as a promissory note for 100*l*., and induced C. to advance him 100*l*. upon it. A. was indicted for defrauding C. Held, that C. had his remedy against B. on the note, and that the fraud, therefore, not being upon C., but upon B., the indictment was not sustained by the evidence (*q*).

CONSIDERATIONS ILLEGAL AT COMMON LAW.

The consideration given for a bill or note must not be illegal. It is said, that the test, whether a contract be contaminated with an illegal transaction is this: Does the plaintiff require any aid from the illegal transaction to establish his case? (*r*) Considerations or contracts are illegal, either, first, at common law; or, secondly, by statute (*s*).

Immoral.

Considerations illegal at common law are the following:— *First, such as violate the rules of religion or morality.* Though the law does not pretend to enforce religious or moral obligations as such, yet it seizes every opportunity of countenancing them; and, therefore, will not assist a man whose claim for redress is founded on their violation. "*Ex turpi causâ non oritur actio.*" "Justice," says Lord Mansfield, "must be drawn from pure fountains."

Thus, for example, a bond or note given in consideration of future illicit cohabitation is void, but past cohabitation is not an illegal consideration so as to avoid a deed, though it is not sufficient to support a promise (*t*). So the rent of lodgings knowingly let for the purpose of prostitution, is

(*p*) *Morris* v. *Lee*, 2 Ld. Raym. 1396; 1 Stra. 629, S. C.; Bayley, 6th ed. 509; *Thiedemann* v. *Goldschmidt*, 1 De G., F. & J. 4.

(*q*) *Rex* v. *Revett*, Bury Summer Assizes, 1829, *coram* Garrow, B.

(*r*) *Simpson* v. *Bloss*, 7 Taunt. 246; 2 Marsh, 542, S. C.

(*s*) The reader must not expect a complete enumeration of all the illegal considerations affecting a contract, but only such as are of most frequent occurrence, or useful as illustrating some principle.

(*t*) *Binnington* v. *Wallis*, 4 B. & Ald. 651; *Gibson* v. *Dickie*, 3 M. & Sel. 463; *Nye* v. *Mosely*, 6 B. & C. 133; 9 D. & R. 165, S. C.; *Beaumont* v. *Reeve*, 15 L. J., Q. B. 141; 8 Q. B. 483, S. C.

CHAPTER X.

an illegal consideration (*u*). A wager as to the sex of a third person is illegal, because it tends to indecent evidence, to injure the feelings of the individual, and disturb the peace of society (*v*). So is a wager as to whether an unmarried woman had borne, or would have, a child (*x*). And any bill or note founded on such illegal considerations would be void.

In contravention of public policy.

The second sort of agreements, illegal at common law, are *such as contravene public policy.*

If it be merely doubtful whether an agreement be at variance with the public interest, it is not void; it must be clearly and indubitably in contravention of public policy (*y*). A contract in general restraint of trade, as, not to carry on a particular business anywhere in England, is illegal and void; though an agreement not to trade within a specific distance of a particular place, or not with certain customers, is good (*z*), although unlimited in point of time (*a*). A contract in general restraint of marriage is void (*b*), as, a bond given by a widow conditional for the payment of a sum of money if she should marry again (*c*). And it makes no difference that the restraint is only for a limited period, as, for six years (*d*). An undertaking for reward to procure a marriage between two parties is void (*e*). A contract tending to the injury of the revenue, by evading or violating the customs and excise laws, is illegal (*f*). But if a trader sell goods with the *mere knowledge* that the purchaser intends to make an illegal use of them, without in any way lending his aid to the effectuation of the unlawful purpose,

(*u*) *Girardy* v. *Richardson*, 1 Esp. 13; *Howard* v. *Hodges*, Selw. N. P. 7th ed. 68.

(*v*) *Da Costa* v. *Jones*, Cowp. 729.

(*x*) *Ditchburn* v. *Goldsmith*, 4 Camp. 152.

(*y*) *Richardson* v. *Mellish*, 2 Bing. 229; 9 Moore, 435, S. C.

(*z*) Co. Litt. 206, *b*. *n*. 1; *Hunlock* v. *Blacklowe*, 2 Saund. 156, n. 1; *Mitchel* v. *Reynolds*, 1 P. Wms. 181; 10 Mod. 130, S. C.; *Davis* v. *Mason*, 5 T. R. 118; *Ward* v. *Byrne*, 5 M. & W. 548; *Tallis* v. *Tallis*, 1 E. & B. 391. Where the covenant is not to carry on business within two districts, one small and reasonable, and the other large and unreasonable, it is divisible. See *Mallan* v. *May*, 11 M. & W. 653; *Green* v. *Price*, 13 M. & W. 695; *Price* v. *Green*, 16 M. & W. 346.

(*a*) *Pemberton* v. *Vaughan*, 12 Q. B. 87; *Sainter* v. *Ferguson*, 7 C. B. 716.

(*b*) *Lowe* v. *Peers*, 4 Burr. 2225.

(*c*) *Baker* v. *White*, 2 Vern. 215.

(*d*) *Hartley* v. *Rice*, 10 East, 22.

(*e*) *Hall* v. *Potter*, 3 Lev. 411; *Roberts* v. *Roberts*, 3 P. Wms. 66; Com. Dig. Chancery, 3 Z. 8.

(*f*) *Biggs* v. *Lawrence*, 3 T. R. 454; *Vandyk* v. *Hewitt*, 1 East, 97; *Taylor* v. *Crowland Gas Company*, 10 Exch. 293.

he may sustain an action on the contract (*g*). Considerations impeding the course of public justice, as, dropping a criminal prosecution for a felony or a public misdemeanor, or suppressing evidence, are illegal considerations (*h*). But it has been held that compounding a private misdemeanor is a good consideration for a note (*i*). A wager on the result of a criminal prosecution is illegal (*k*). A note, given after conviction to the prosecutor, for the expenses of the prosecution, the amount of which is settled by the Court, is legal (*l*). So, though the particulars of the arrangement are not communicated to the Court and sanctioned by them (*m*). And the substitution of a good bill for a forged one, at the instance of the forger, if unaccompanied with any stipulation to stifle a prosecution for forgery, is not illegal (*n*). Contracts respecting the sale of public offices are for the most part void at common law (*o*), as well as by statute. Any contract tending to cause a neglect of duty in a public officer is illegal. Thus, though the 6 Geo. 2, c. 31, authorizes parish officers to take security from the putative father of a bastard child to indemnify the parish, it is not lawful for them to take an absolute promissory note for a sum certain, and such a note is void. "It is a shocking consideration," observes Lord Ellenborough, "that by means of such a security as this, the parish officers, who have a public duty imposed upon them to take care that the father shall make a proper provision for the maintenance of the child, acquire an interest that the child should live as short a time as possible" (*p*). Contracts with a public enemy are illegal; and a bill drawn by an alien enemy on his debtor here, and indorsed to the plaintiff, a British subject resident in the hostile country, cannot be recovered on, though the plaintiff do not sue till the return of peace, and though he were resident at the time of taking the bill in the hostile country (*q*). But where a British prisoner in France drew a bill on an English subject, and indorsed it to

(*g*) *Hodgson* v. *Temple*, 5 Taunt. 181.

(*h*) *Nerot* v. *Wallace*, 3 T. R. 17; *Fallows* v. *Taylor*, 7 T. R. 475; *Edgecombe* v. *Rodd*, 5 East, 294.

(*i*) *Drage* v. *Ibberson*, 2 Esp. 643; and see *Coppock* v. *Bower*, 4 M. & W. 361.

(*k*) *Evans* v. *Jones*, 5 M. & W. 77.

(*l*) *Beeley* v. *Wingfield*, 11 East, 46; see *Keir* v. *Leman*, 9 Q. B. 394.

(*m*) *Kirk* v. *Strickwood*, 4 B. & Ad. 421; 1 N. & M. 275, S. C.; and see *Baker* v. *Townshend*, 1 B. Moore, 120.

(*n*) *Wallace* v. *Hardacre*, 1 Camp. 45.

(*o*) *Richardson* v. *Mellish*, 2 Bing. 229; 9 Moore, 435, S. C.

(*p*) *Cole* v. *Gower*, 6 East, 110.

(*q*) *Willison* v. *Patteson*, 7 Taunt. 440.

CHAPTER X.

the plaintiff, then an alien enemy, it was held, that after the return of peace the plaintiff might recover (*r*). And a bill drawn by a British prisoner, in favour of an alien enemy, cannot be enforced by the payee.

CONSIDERATIONS ILLEGAL BY STATUTE.

Among the considerations now or formerly illegal by statute are the following :—

Usury.

1. Usury. The English statutes on this subject are repealed. The decisions on them, however, are still not unimportant with a view to general principles. Moreover, usury laws exist in the United States and in almost all foreign countries. In France and Holland they have been repealed, but re-enacted. It will be more convenient to discuss the nature and former consequences of usury in the Chapter on INTEREST.

Gaming.

2. Gaming considerations. The old statute 16 Car. 2, c. 7, avoided all securities, *written* or *oral*, given to secure any sum of money exceeding 100*l.* lost at play (*s*). And the 9 Anne, c. 14, expressly avoided all *written* contracts for any sum of money won at play, or by betting at play, or lent for playing or betting (*t*); and by subjecting to the animadversion of criminal justice all winnings above 10*l.*, it impliedly avoided all contracts to enforce them also (*u*).

Both acts avoided judgments for gaming debts, but the judgments to which they refer are voluntary judgments given by the loser, and not judgments obtained by an adverse action (*x*).

Any game, whether of skill or chance, was within the acts (*y*).

But both these acts are now repealed by the 8 & 9 Vict. c. 109, s. 15, except so much of the statute of Anne as was altered by the 5 & 6 Will. 4, c. 41.

The statute 8 & 9 Vict. c. 109, makes cheating at play an offence indictable as obtaining money under false pretences (*z*). It further makes all gaming contracts, written or oral, null and void (*a*).

(*r*) *Antoine* v. *Morshead*, 6 Taunt. 237; 1 Marsh, 558, S. C.

(*s*) See *Bentinck* v. *Connop*, 5 Q. B. 693.

(*t*) See also 12 Geo. 2, c. 28, and 18 Geo. 2, c. 34.

(*u*) Sect. 5; see *Daintree* v. *Hutchinson*, 10 M. & W. 85; *Applegarth* v. *Colley*, 10 M. & W. 723.

(*x*) *Lane* v. *Chapman*, 11 Ad. & E. 966; 3 P. & D. 668, S. C.; affirmed in error, ibid. 980.

(*y*) *Sigell* v. *Jebb*, 3 Stark. 1.

(*z*) Sect. 17.

(*a*) Sect. 18. But not illegal in the sense of criminal, or in such a sense as to impose on the subsequent holder of a negotiable instrument the obligation of proving the consideration he himself gave. *Fitch* v. *Jones*, 24 L. J., Q. B. 293;

Money lent to play at any illegal game cannot be recovered back by the lender. "This principle," says Lord Abinger, "was not for the first time laid down in *Cannan* v. *Bryce* (*b*), but that case finally settled that the repayment of money lent for the express purpose of accomplishing an illegal object cannot be enforced" (*c*).

To discuss in detail the complicated provisions of the gaming acts, and the minute distinctions which arise on them, would be to wander from the main subject.

Horse-racing.

Horse-races, though legalized by 13 Geo. 2, c. 19, and 18 Geo. 2, c. 34, were within the former acts against gaming (*d*). But a bet under 10*l*., on a legal horse-race, was valid (*e*); though a bill or note given to secure it would have been void (*f*). But if the horse-race be for a sum less than 50*l*. (*g*), or above 50*l*., but not a contest between horses running on the turf, the bet was void (*h*).

Innocent indorsee.

A bill of exchange or note given for a gaming debt was, until recently, void, even in the hands of an innocent indorsee for value, as against the party losing at play: but as against other parties it was, and still is, valid. Thus, if a bill were accepted, or a note made, for a gaming debt, no party could charge the acceptor or maker (*i*); but the drawer and indorser were and are nevertheless liable (*k*).

The same rule of law applied to bills or notes given for the ransom of captured ships or cargoes (*l*); to bills or notes given by a bankrupt to his creditor to induce him to sign the bankrupt's certificate (*m*). In all these cases, as well as in the case of usury, the acts of parliament avoid-

5 E. & B. 238, S. C. See further, on the construction of the act, *Parsons* v. *Alexander*, 24 L. J., Q. B. 277; 5 E. & B. 263, S. C.; *Combes* v. *Dibble*, Law Rep., 1 Exch. 248.

(*b*) 3 B. & A. 179.

(*c*) *M'Kinnell* v. *Robinson*, 3 M. & W. 434.

(*d*) *Goodburn* v. *Marley*, 2 Stra. 1159; *Clayton* v. *Jennings*, 2 W. Bl. 706; *Blaxton* v. *Pye*, 2 Wils. 309; *Shillito* v. *Theed*, 7 Bing. 405; 5 M. & P. 303, S. C.

(*e*) *M'Allister* v. *Haden*, 2 Camp. 488.

(*f*) 9 Anne, c. 14, s. 1.

(*g*) *Johnson* v. *Bann*, 4 T. R. 1.

(*h*) *Ximenes* v. *Jacques*, 6 T. R. 499; *Whaley* v. *Pajot*, 2 B. & P. 51; see now 8 & 4 Vict. c. 5, which repeals 13 Geo. 2, c. 19, and 8 & 9 Vict. c. 109.

(*i*) *Bowyer* v. *Bampton*, 2 Stra. 1155; *Shillito* v. *Theed*, 7 Bing. 405; 5 M. & P. 308, S. C.

(*k*) Ibid.; *Edwards* v. *Dick*, 4 B. & Ald. 212.

(*l*) 45 Geo. 3, c. 72, s. 17.

(*m*) 12 & 13 Vict. c. 100, s. 202; *Wiggins* v. *Read*, C. P., T. T. 1862; or not to oppose the order for discharge, 24 & 25 Vict. c. 134, s. 166.

CHAPTER X.

ing bills or notes, so far as they make the instruments absolutely void, are repealed by the 5 & 6 Will. 4, c. 41, s. 1 (*n*). This statute enacts, that in these cases bills or notes which would otherwise have been void, shall only be taken to have been given for an illegal consideration (*o*). The effect of the enactment is conceived to be, that they are good in the hands of an innocent indorsee for value against all parties (*p*).

The second section of this statute enacts, that if a loser at play gives a negotiable instrument, void under the acts against gaming, and pays the transferee, he may recover back the money so paid from the person to whom he originally gave the bill or note (*q*).

New security.

Even under the old law a renewed security was good, if given to an innocent indorsee before the bill fell due (*r*).

Stock-jobbing.

3. Stock-jobbing. The Stock-Jobbing Act was the 7 Geo. 2, c. 8, made perpetual by 10 Geo. 2, c. 8, but now both statutes are repealed by the 23 & 24 Vict. c. 28 (*s*). The principal provisions of the first-mentioned statute were as follow (*t*):

1. Putting upon stock was prohibited; that is, a contract to pay or receive a certain sum of money for the liberty to deliver or not to deliver, or to accept or refuse a certain quantity of stock at a fixed price on a given day. Such a contract is declared void, the money paid is made recover-

(*n*) This statute is preserved in force by 8 & 9 Vict. c. 109, s. 15, the effect of which seems to be, that a winner of stakes may recover, though a promissory note for the amount would be void. *Batty* v. *Marriott*, 17 L. J., C. P. 215; 5 C. B. 818, S. C.

(*o*) As to the effect of this enactment, see *Edmunds* v. *Groves*, 2 M. & W. 642. Both sections of the statute are prospective. *Hitchcock* v. *Way*, 2 N. & P. 72; 6 Ad. & El. 943, S. C.; *Humphreys* v. *Earl of Waldegrave*, 6 M. & W. 622.

(*p*) *Hay* v. *Ayling*, 16 Q. B. 423. See *Fitch* v. *Jones*, 5 E. & B. 238. But see *Goldsmid* v. *Hampton*, 5 C. B., N. S. 94. In the case of a bankrupt it is now expressly so enacted, 24 & 25 Vict. c. 134, s. 166.

(*q*) But it is no defence to an action against an acceptor that the bill was given for bets on horse-races, made by the drawer as his agent, and paid without his request. *Oulds* v. *Harrison*, 10 Exch. 572.

(*r*) *George* v. *Stanley*, 4 Taunt. 683.

(*s*) *Quære*, whether some cases of gaming in stock may not have been within 9 Anne, c. 14, and be not now within 8 & 9 Vict. c. 109.

(*t*) Transactions in foreign stock are not within this statute. *Henderson* v. *Bise*, 3 Stark. 158; *Wells* v. *Porter*, 2 Bing. N. C. 723; *Oakley* v. *Rigby*, 2 Bing. N. C. 732; nor railway shares, *Hewitt* v. *Price*, 4 M. & G. 855; *Williams* v. *Trye*, 18 Beav. 366.

able, and both parties are subject to the penalty of 500*l.*, unless the money paid has been recovered or refunded.

2. The payment of money, instead of delivering or receiving stock, subjects to the penalty of 100*l.*

3. It has been supposed that contracts to buy or sell stock, of which the seller is not at the time possessed, subjected both parties to the penalty of 500*l.* But such contracts were afterwards held to be legal (*u*).

It was formerly held, that money expended by another person in settling a stock-jobber's differences for him, or money lent him to settle them with, could be recovered (*x*). But it was afterwards settled, that as the fifth section of the act 7 Geo. 2, c. 8, prohibits expressly the payment of money for the arrangement of differences, a person paying differences for another, or lending him money to pay them himself, advanced money for an illegal purpose, and could not recover it back (*y*).

The following cases relating to bills have been decided on this statute:—The defendant employed a broker (*z*), to pay differences for him, and after they were settled a dispute arose between them as to the amount of money so paid by the broker. The case was referred to the plaintiff and three other arbitrators, who awarded the sum of 306*l.* 12*s.* 6*d.* to be due from the defendant to his broker. The broker then drew on the defendant for 100*l.*, part of this sum; the defendant accepted the bill, and the broker indorsed it to the plaintiff. It was held that the bill was void as between the broker and the defendant, and the plaintiff, having been an arbitrator, had notice of the illegal consideration, and stood in the same situation as the broker (*a*). Where a broker had settled differences for his principal *in omnium*, had taken his principal's acceptance for the amount, and indorsed the bill when overdue, it was held, first, that jobbing *in omnium* was within the act; secondly, that the bill was void in the hands of the broker; and thirdly, that having

(*u*) *Mortimer* v. *M'Callan*, 7 M. & W. 20; affirmed 9 M. & W. 636.

(*x*) *Faikney* v. *Reynous*, 4 Burr. 2069; *Petre* v. *Hannay*, 3 T. R. 418.

(*y*) *Cannan* v. *Bryce*, 3 B. & Ald. 179; *M'Kinnell* v. *Robinson*, 3 M. & W. 434.

(*z*) Stock brokers are within the statutes 6 Anne, c. 16, s. 4, and 57 Geo. 3, c. 40; *Clarke* v. *Powell*, 4 B. & Ad. 846; 1 N. & M. 492, S. C.; by which brokers are prohibited under a penalty from acting in London without admission by the mayor and aldermen. For the condition of the bond given by brokers, and the oath taken by them, see *Kemble* v. *Atkins*, Holt, N. P. C. 427.

(*a*) *Steers* v. *Lashley*, 6 T. R. 61; 1 Esp. 166, S. C.

CHAPTER X.

been indorsed when overdue, it was also void in the hands of the indorsee, as against the acceptor (*b*). A stock-jobber gave his broker a promissory note for differences paid for him by his broker, and the broker indorsed it overdue to the plaintiffs. The plaintiffs threatened to sue the defendants upon the note, but they consented to give up the note, and take the defendant's bond instead, knowing, at the time they took the bond, that the note had been given on an illegal consideration. Held, that they could not originally have recovered upon the note, nor afterwards upon the bond (*c*). Where a man gave his acceptance for differences owing from himself to the drawer, and the drawer indorsed the bill for value without notice, it was held that the indorsee might recover against the drawer (*d*). And as the statute does not expressly avoid securities given for differences, it should seem, the indorsee might have recovered against the acceptor (*e*). Where a man sells stock of which he is not possessed, and afterwards buys it and transfers it to the vendee, he might, notwithstanding the statute, maintain an action for the price (*f*). This act is to be construed strictly (*g*).

Other considerations illegal by statute.

Besides the cases which have been mentioned, there are many other instances of securities expressly avoided by the legislature; as, gaming policies on ships or lives (*h*); sale of an office (*i*); a stipulation with a sheriff for ease or favour (*k*); a security whereby a creditor of a bankrupt who has proved his debt is to receive more than others (*l*); or to receive anything for signing the bankrupt's certificate (*m*); or for not opposing the order for his discharge (*n*); a security given by a man for a debt from which he has been dis-

(*b*) *Brown* v. *Turner*, 7 T. R. 630; 2 Esp. 631, S. C.

(*c*) *Amory* v. *Merryweather*, 2 B. & C. 573; 4 D. & R. 86, S. C.

(*d*) *Day* v. *Stuart*, 6 Bing. 109; 3 M. & P. 334, S. C.

(*e*) See Mr. J. Holroyd's observations in *Broughton* v. *Manchester Water Works Company*, 3 B. & Ald. 10.

(*f*) *Mortimer* v. *M'Callan*, 7 M. & W. 20; affirmed 9 M. & W. 636.

(*g*) *Wells* v. *Porter*, 2 Bing. N. C. 780; *Hewitt* v. *Price*, 4 M. & G. 355.

(*h*) 19 Geo. 2, c. 37; 14 Geo. 3, c. 48.

(*i*) 5 & 6 Edw. 6, c. 16; 49 Geo. 3, c. 126; 53 Geo. 3, c. 129.

(*k*) 23 Hen. 6, c. 9.

(*l*) 12 & 13 Vict. c. 106, s. 268; *Rose* v. *Main*, 1 Bing. N. C. 357; 1 Scott, 127, S. C.; *Davis* v. *Holding*, 1 M. & W. 159.

(*m*) 12 & 13 Vict. c. 106, s. 202; *Birch* v. *Jervis*, 3 C. & P. 379; *Taylor* v. *Wilson*, 5 Exch. 251; *Hankey* v. *Cobb*, 1 Q. B. 490; *Smith* v. *Saltzman*, 9 Exch. 235.

(*n*) 24 & 25 Vict. c. 134, s. 166.

charged by the Insolvent Debtors' Act (*o*). And to these, (except where the statute (*p*) gives a title to a holder for value without notice,) the same general rules apply as to securities given for a gaming debt, before that statute.

Many cases there are, also, in which, though the transaction is prohibited by the legislature, the security is not expressly avoided. In such instances, the bill is void in the hands of parties to the illegal transaction, or cognizant thereof, but not in the hands of a *bonâ fide* indorsee for value, before the bill is due, without notice of the illegality (*q*). The 24 Geo. 2, c. 40, s. 12, prohibits persons from recovering a debt incurred by sale of spirituous liquors, in less quantities than of the value of 20*s.*; and, where part of the consideration for a bill was for spirituous liquors, within the statute, and part for money lent, the bill was wholly void in the hands of the payee (*r*). But where the defendant was indebted to the plaintiff for board and lodging, and for spirituous liquors in quantities of less value than 20*s.*, and having made the plaintiff several unappropriated payments, gave a promissory note for the balance, it was held that the plaintiff might appropriate these payments to the discharge of his demands for spirituous liquors, and that the consideration of the note being thus purged of those items, the plaintiff might recover on the note (*s*).

So a bill of exchange accepted to secure payment of money taken at the doors of an unlicensed theatre, is void (*t*) in the hands of the payee, who knew the theatre to be unlicensed. Therefore, also, as the statute 57 Geo. 3, c. 99, prohibits spiritual persons from trading, it was held, that a joint-stock banking company, in which a beneficed clergyman held shares, could not sue as indorsee on a bill of exchange (*u*). In consequence of this decision, an act of

(*o*) *Evans* v. *Williams*, 1 C. & M. 30; 3 Tyrw. 266, S. C.; *Ashley* v. *Killick*, 5 M. & W. 509; and see *Kernot* v. *Pittis*, 2 E. & B. 421; *Humphreys* v. *Willing*, 32 L. J., Ex. 33; 1 Hurl. & Colt. 7.

(*p*) 5 & 6 Will. 4, c. 41, s. 1; 24 & 25 Vict. c. 134, s. 166.

(*q*) *Wyat* v. *Bulmer*, 2 Esp. 538.

(*r*) *Scott* v. *Gilmore*, 3 Taunt. 226. *Quære tamen*, see *Crookshanks* v. *Rose*, 1 M. & Rob. 100; 5 C. & P. 19, S. C. Where two sorts of spirits had been supplied at one time, the amount of each sort being under 20*s.*, but of both together above 20*s.*, it was held that the value of both was recoverable. *Owens* v. *Porter*, 4 C. & P. 367.

(*s*) *Crookshanks* v. *Rose*, 1 M. & Rob. 100; 5 C. & P. 19, S. C. The 24 Geo. 2, c. 40, s. 12, is partially repealed by the 25 & 26 Vict. c. 38, as to spirituous liquors consumed elsewhere than on the premises where sold.

(*t*) *De Begnis* v. *Armistead*, 10 Bing. 107; 3 M. & P. 511, S. C.

(*u*) *Hall* v. *Franklin*, 3 M. & W. 259; 1 Har. & W. 8, S. C.

CHAPTER X.

parliament, 1 Vict. c. 10 (continued by 4 Vict. c. 14), was passed to obviate the inconvenience.

But a note given for the amount of an attorney's bill not delivered pursuant to 6 & 7 Vict. c. 73, is good (*x*).

Remedy of agent against principal.

If a person be employed to make an illegal contract, and at the request of his principal discharges a claim made on such a contract, the agent can recover from the principal the money so paid on his account (*y*).

Notice of fraudulent or illegal consideration.

It is no defence that the plaintiff being a transferee of a bill or note had notice of a fraudulent or illegal consideration, if he can deduce title from a prior party not shown to have had any such notice (*z*).

Illegality of consideration when judgment recovered.

A judgment recovered by default will not be set aside, on the ground of illegality in the consideration, unless the defendant can affect the plaintiff with knowledge of that fact: but the Court has permitted him to try that in an issue (*a*).

Illegality of part of the consideration.

If part of the consideration of a bill or note be fraudulent or illegal, the instrument is vitiated altogether (*b*). Where parties have woven a web of fraud or wrong, it is said to be no part of the duty of Courts of Justice to unravel the threads.

Renewal of bill given on illegal consideration.

If a bill originally given upon an illegal consideration be renewed, the renewed bill is also void (*c*), unless the amount be reduced by excluding so much of the consideration for the original bill as was illegal (*d*).

(*x*) *Jeffreys* v. *Evans*, 14 M. & W. 210.

(*y*) *Knight* v. *Cambers*, 24 L. J., C. P. 121; 15 Com. B. 562, S. C.; *Knight* v. *Fitch*, 24 L. J., C. P. 122; 15 Com. B. 500, S. C.; *Rosewarne* v. *Billing*, 33 L. J., C. P. 55; 15 Com. B., N. S. 316, S. C.

(*z*) *Masters* v. *Ibberson*, 18 L. J., C. P. 348; 8 C. B. 100, S. C.

(*a*) *George* v. *Stanley*, 4 Taunt. 683; *Davison* v. *Franklin*, 1 B. & Ad. 142.

(*b*) *Robinson* v. *Bland*, 2 Burr. 1077; *Scott* v. *Gilmore*, 3 Taunt. 226; *Crookshanks* v. *Rose*, 5 Car. & P. 19; 1 M. & Rob. 100, S. C.; Story on Promissory Notes, s. 190; *Williams* v. *Bulmore*, 33 L. J., Ch. 461.

(*c*) *Chapman* v. *Black*, 2 B. & Ald. 588; *Wynne* v. *Callender*, 1 Russ. 293; *Preston* v. *Jackson*, 2 Stark. 237.

(*d*) Ibid.; and see *Hubner* v. *Richardson*, Bayley, 6th ed. 527. In some cases, where there has been a change of parties, the defendant must plead the whole agreement on which the renewed bill was given. *Boulton* v. *Coghlan*, 1 Bing. N. C. 640. In others, where the parties are the same, it

And if a bill or note be originally without any consideration, and it is given up, another bill between the same parties being substituted for it, the giving up of the first bill is no consideration for the second, but both are alike void for want of consideration (*e*).

is sufficient to plead the illegality attaching to the original bill without mentioning the substitution. *Hay* v. *Ayling*, 20 L. J., Q. B. 171; 16 Q. B. 423, S. C.

(*e*) *Southall* v. *Rigg*, 11 C. B. 481. It has, however, been held that bills accepted subsequently to the passing of the 17 & 18 Vict. c. 90, abolishing the usury laws, in renewal of bills accepted before that act, are not without consideration. *Flight* v. *Reed*, 32 L. J., Exch. 265; 1 Hurl. & Colt. 703, S. C.; Martin, B., *dissentiente*.

CHAPTER XI.

OF THE TRANSFER OF BILLS AND NOTES.

Division of the Subject . 147
WHAT BILLS TRANSFERABLE 147
Effect of Indorsement of a Bill not negotiable . 147
Of a Note not negotiable . 148
Subsequent insertion of Words creating Negotiability 148
MODES OF TRANSFER . 148
Blank Indorsement . . 149
Special Indorsement . . 149
On the Face of Bill . . 150
An Allonge 150
Misspelt Indorsement . 150
By a Plurality of Holders 150
Conversion of blank into special Indorsement . 150
Delivery necessary . . 151
LIABILITY OF INDORSER . 151
How declined 152
By Indorsement sans recours 152
By Agreement . . . 152
By converting blank into special Indorsement . 153
May be suspended on a Condition . . . 153
What Indorsement admits . 153
Striking out Indorsements . 154
RIGHTS OF INDORSEE . 155
Of Transferee to compel Indorsement . . . 155
Where a Bill is re-indorsed to a prior Indorser . 155
Where the Indorser is a Trustee 156
Restrictive Indorsements . 157
LIABILITY OF PERSONS TRANSFERRING BY DELIVERY 158
No Liability on the Instrument 159
Nor in general on the Consideration . . . 159
Where the Bill is considered as sold 159
Unless Bill or Note given for pre-existing Debt . 161
Other Exceptions to the general Rule . . . 161
Sale to an Agent of a foreign Principal . . 162
Warranty of Genuineness . 162
No Liability to subsequent Transferee . . . 163
Effect of Fraud . . 163
RIGHTS OF TRANSFEREE BY DELIVERY . . 163
Former Effect of Negligence in the Transferee . 163
Present Effect of Negligence or Fraud . . 164
Title of an Agent . . 164
Pledging Bills payable to Bearer 164
Other Instruments payable to Bearer . . . 164
Metallic Tokens . . 165
TRANSFER UNDER PECULIAR CIRCUMSTANCES . 165
Before Bill filled up . . 165
After Refusal to accept . 166
Where the Transferee has no Notice . . . 166
After due 167
Transfer of overdue Check 169
Of Note payable on Demand 169
Pleading 170
Equitable Relief in case of outstanding overdue Bill 170
Burthen of Proof . . 170
Check drawn on Bearer's Banker 170
After Abandonment of Right 170

After Payment . . . 170
By other Parties . . 171
After premature Payment . 172
After partial Payment . 172
Where there is a Question whether the Bill was paid or transferred . 172
Transfer to Acceptor . 172
Transfer for Part of the Sum due . . . 172
For Residue unpaid . . 173
After Release . . . 173
After Action brought . 173
Transfer abroad . . 173
After Holder's Death . 174
After Bankruptcy . . 174
After Marriage . . 174
By Deposit with a Banker 174
By Will 175
Donatio Mortis Causâ . 175
How it resembles a Legacy 177
How it differs from a Legacy 177
Execution 177
Larceny 178
Embezzlement . . . 178
Effect of a Transfer in removing Technical Difficulties in suing . . 178
WHEN A COURT OF EQUITY WILL RESTRAIN NEGOTIATION . . . 179

Division of the subject.

IN examining the subject of the transfer of bills and notes, let us consider, first, what bills are transferable; secondly, the modes of transfer; thirdly, the nature and extent of an indorser's liability; fourthly, the rights of an indorsee; fifthly, the liability of a person transferring by delivery; sixthly, the rights of a transferee by delivery; seventhly, transfer under peculiar circumstances; eighthly, and lastly, when a Court of Equity will restrain a transfer.

WHAT BILLS TRANSFERABLE.

First, as to what bills are transferable (*a*). We have already seen, that a bill or note which does not contain a direction or promise to pay to *the order* of the payee, or *to bearer*, is not transferable; that is, not so as to charge the drawer or acceptor by an assignment of the right of action.

Effect of indorsement of a bill not negotiable.

But if, nevertheless, the payee do indorse *a bill* not negotiable, he is liable on his indorsement to his indorsee (*b*). For every indorser of a *bill* is in the nature of a new drawer (*c*). If the bill, however, were not originally negotiable, it seems to have been considered by the Court of Common Pleas, that the first drawing exhausts the stamp,

(*a*) See the observations on the Assignability of Bills, ante, p. 2.

(*b*) *Hill* v. *Lewis*, 1 Salk. 132; *Smallwood* v. *Vernon*, 1 Stra. 478; *Gwinnell* v. *Herbert*, 5 Ad. & E. 436; *Burmester* v. *Hogarth*, 11 M. & W. 97; *Penny* v. *Innes*, 1 C., M. & R. 439; 5 Tyr. 107, S. C. But see *Plimley* v. *Westley*, infra, where the Court seemed to think that the stamp laws might interpose an obstacle.

(*c*) And therefore a blank indorsement on a bill not negotiable has been held to operate as the drawing of a bill payable to bearer. *Matthews* v. *Bloxam*, 33 L. J., Q. B. 209. See *Allen* v. *Walker*, 2 M. & W. 317; 5 Dowl. 460.

CHAPTER XI.

and that the indorsee cannot acquire a right, without a new stamp (*d*), which cannot by law be impressed. If the declaration on a bill indorsed in blank but not originally negotiable, or not indorsed by the payee, state that the defendant, the indorser, drew and indorsed the bill, payable to his order, it will upon evidence be open to the double objection, that the same act is treated both as a drawing and an indorsement, which it cannot be, and that the bill is described as made payable to order, whereas the effect of the blank indorsement is to make it payable to bearer (*e*).

Of a note not negotiable.

But the indorsement of *a note* (whether originally negotiable or not), by one to whom it has not been transferred, will not make the indorser liable on his indorsement (*f*). For though every indorser of a bill may be treated, without inconvenience, as a new drawer or maker (for in that character he still requires notice of dishonour), yet an indorser of a note cannot be treated as a drawer or maker of the *note*, without altering his situation for the worst, and depriving him of the right to notice of dishonour.

Subsequent insertion of words creating negotiability.

The words or *to his order* or *to bearer*, if omitted by mistake, may be afterwards inserted, without vitiating the instrument either at common law or under the Stamp Act (*g*).

Whether a bill or note be negotiable or not is a question of law (*h*).

MODES OF TRANSFER.

Secondly, as to the modes of transfer. We have observed, that a bill or note, if payable to order, is not transferable, except by indorsement; but that, if payable to bearer, it is transferable by mere delivery (*i*).

(*d*) *Plimley* v. *Westley*, 2 Bing. N. C. 249; 2 Scott, 423; 1 Hodges, 324, S. C., which however was the case of a note.

(*e*) *Burmester* v. *Hogarth*, 11 M. & W. 97.

(*f*) *Gwinnell* v. *Herbert*, 5 A. & E. 436; 6 N. & M. 723, S. C.; but see Story on Promissory Notes, s. 138.

(*g*) *Kershaw* v. *Cox*, 3 Esp. 246. See the Chapter on ALTERATION.

(*h*) *Grant* v. *Vaughan*, 3 Burr. 1516.

(*i*) It is conceived, that if an agent, a banker for example, hold a bill transferable by delivery, a direction given to him by the owner to hold it for another, is a sufficient transfer by delivery. And that if the owner make over a bill transferable by delivery, *by deed*, and perhaps by any valid written or verbal contract, without actually delivering the bill, the deed amounts to delivery in law, and the transferer holds it as agent of the transferee.

If a bill be made payable to A., or order, for the use of B., B. has but an equitable title, and the right of transfer is in A. alone (*k*).

Blank indorsement.

Indorsements are of two sorts: an indorsement *in blank*, or, as it is sometimes termed, a *blank* indorsement, and an indorsement *in full*, or *special* indorsement (*l*). No particular form of words is essential to any indorsement. A *blank* indorsement is made by the mere signature of the indorser (usually and properly, though not necessarily) on the back of the bill (*m*); its effect is to make the instrument thereafter payable to bearer (*n*).

"An indorsement in blank," says Lord Ellenborough, "conveys a joint right of action to as many as agree in suing on the bill" (*o*). Therefore, where three persons separately indorsed a bill for the accommodation of the drawer, which was afterwards dishonoured and returned to them, and they paid the amount among them, it was held that they might bring a joint action against a previous indorser (*p*). But where a bill of exchange was, by the direction of the payee, indorsed in blank, and delivered to A., B. & Co., who were bankers, on the account of the estate of an insolvent, which was vested in trustees for the benefit of his creditors, Lord Ellenborough held, that A. and B., two of the members of this firm, and also trustees, could not, conjointly with another trustee who was not a member of the firm, maintain an action against the indorser, without some evidence of the transfer of the bill to them, as trustees, by the firm, by delivery or otherwise (*q*).

Special indorsement.

An indorsement *in full*, besides the signature of the indorser, expresses in whose favour the indorsement is made. Thus, an indorsement in full by A. B. is in this form: "Pay Mr. C. D., or order. A. B." The signature of the indorser being subscribed to the direction, its effect is to make the instrument payable to C. D. or his order only; and, accordingly, C. D. cannot transfer it otherwise than by indorsement. The omission of the words, "*or order*," is not material in a special indorsement; for the indorsee takes it

(*k*) *Evans* v. *Cramlington*, Carth. 5; *Cramlington* v. *Evans*, 2 Vent. 207; Skin. 264.

(*l*) The mark of a person who cannot write is a sufficient indorsement. *George* v. *Surrey*, M. & M. 516.

(*m*) See infra.

(*n*) *Peacock* v. *Rhodes*, Doug. 611; *Francis* v. *Mott*, Doug. 612.

(*o*) *Ord* v. *Portal*, 3 Camp. 239.

(*p*) *Low* v. *Copestake*, 3 C. & P. 300.

(*q*) *Mackell* v. *Kinnear*, 1 Stark. 499.

CHAPTER XI.

with all its incidents, and, among the rest, with its negotiable quality, if it were originally made payable to order (*r*).

If a bill be once indorsed in blank, though afterwards indorsed in full, it will still, as against the drawer, the payee, the acceptor, the blank indorser, and all indorsers before him, be payable to bearer (*s*); though, as against the special indorser himself, title must be made through his indorsee.

Indorsements on the face of a bill.

It is not essential to the validity of these written transfers, though called indorsements, that they be on the back; they may be on the face of a bill of exchange or promissory note (*t*).

An *allonge*.

There is no legal limit to the number of indorsements, and if there be not room to write them all distinctly on the back of the bill, the supernumerary indorsements may be written on a slip of paper annexed to the bill, called, in French, an "*allonge*." The *allonge* is thenceforth part of the bill, and requires no additional stamp.

Misspelt indorsement.

A misspelling will not necessarily avoid an indorsement (*u*).

By a plurality of holders.

If two persons, not being partners, are payees of a bill or note, both must indorse (*x*).

Conversion of blank into special indorsement.

The indorsee may convert a blank indorsement into a special one in his own favour, by superscribing the necessary words. C. having a bill payable to himself, or order, indorsed it in blank, leaving a vacant space above, and sent it to J. S., his friend, who got it accepted; but the money not being paid, C. brought an action against the acceptor, and it was objected that the action should have been brought by J. S. But, per Holt, C. J.: "J. S. had it in his power to act either as servant or assignee. If he had filled up the

(*r*) *Moore* v. *Manning*, Com. Rep. 311; *Acheson* v. *Fountain*, 1 Stra. 557; *Edie* v. *East India Company*, 2 Burr. 1216; 1 W. Bl. 295, S. C.; *Cunliffe* v. *Whitehead*, 3 Bing. N. C. 829; 5 Scott, 31; 6 Dowl. 63, S. C.; *Gay* v. *Lander*, 6 C. B. 336.

(*s*) *Smith* v. *Clarke*, Peake, 225; *Walker* v. *M'Donald*, 2 Exch. 527; 17 L. J., Exch. 377, S. C.

(*t*) *Reg.* v. *Bigge*, 1 Stra. 18; *Ex parte Yates*, 27 L. J., Bkcy. 9; *Yarborough* v. *Bank of England*, 16 East, 6.

(*u*) See *Leonard* v. *Wilson*, 2 C. & M. 589; 4 Tyr. 415, S. C.

(*x*) *Carvick* v. *Vickery*, 2 Doug. 653, n.; see ante, as to indorsements by ex-partners, and by co-executors.

blank space, making the bill payable to him, *as he might have done if he would*, that would have witnessed his election to receive it as indorsee" (*y*). The indorsee may also convert the blank indorsement into a special one in favour of a stranger, by superscribing above the indorsement the words "Pay A. B. or order:" and, if he transfer the bill in that way instead of indorsing, he is not liable as indorser (*z*).

Delivery necessary.

Neither indorsement nor acceptance (*a*) are complete before delivery of the bill. Where A. specially indorsed certain bills to B., sealed them up in a parcel, and left them in charge with his own servant to be given to the postman, it was held that the special indorsement did not transfer the property in the bills till delivery, and that delivery to the servant was not sufficient, though it would have been otherwise had the delivery been made to the postman (*b*). But where A. and B. carried on business in partnership, and being indebted to C., A. who acted as C.'s agent, with the concurrence of B., indorsed a bill in the name of the firm, and placed it amongst the securities which he held for C., but no communication of the fact was made to C. It was held to be a good indorsement by the firm to C. (*c*).

Hence the word *indorse* in the declaration on a bill imports a delivery and transfer to the indorsee, so as to confer title. Therefore, under a traverse of the indorsement the defendant may show that the circumstances were such as that the indorsement did not effect a legal delivery of the bill to the indorsee (*d*), whether the actual delivery were to a third person, or to the indorsee himself (*e*).

LIABILITY OF INDORSER.

Thirdly, as to the liability of an indorser.

Every indorser of a bill is in the nature of a new drawer (*f*);

(*y*) *Clark* v. *Pigott*, 12 Mod. 193; 1 Salk. 126, S. C.

(*z*) *Vincent* v. *Horlock*, 1 Camp. 442.

(*a*) *Cox* v. *Troy*, 5 B. & Ald. 474; 1 D. & Ry. 38, S. C.; *Chapman* v. *Cotterell*, 34 L. J., Exch. 186.

(*b*) *Rex* v. *Lambton*, 5 Price, 428; *Adams* v. *Jones*, 4 P. & D. 174; 12 Ad. & El. 455; *Brind* v. *Hampshire*, 1 M. & W. 369; Bayley on Bills, 6th ed. 137.

(*c*) *Lysaght* v. *Bryant*, 9 C. B. 46.

(*d*) *Marston* v. *Allen*, 8 M. & W. 494; *Adams* v. *Jones*, 12 Ad. & El. 455; *Lloyd* v. *Howard*, 20 L. J., Q. B. 1; 15 Q. B. 995, S. C.; see *Robinson* v. *Little*, 18 L. J., Q. B. 29; *Green* v. *Steel*, 1 Q. B. 707. *Denton v Peters* L R 5 C P 475

(*e*) *Bell* v. *Lord Ingestre*, 19 L. J., Q. B. 71; 12 Q. B. 317, S. C.; and see *Barber* v. *Richards*, 6 Exch. 63; *Lloyd* v. *Howard*, 15 Q. B. 995.

(*f*) *Penny* v. *Innes*, 1 C., M. & R. 441; 5 Tyrw. 107, S. C.; see *Allen* v. *Walker*, 2 M. & W. 317; 5 Dowl. 460; 1 M. & W. 44, S. C.; see ante, p. 147.

CHAPTER XI

and is liable to every succeeding holder in default of acceptance or payment by the drawee.

An indorser contracts that if the drawee shall not at maturity pay the bill, he, the indorser, will, on receiving due notice of the dishonour, pay the holder the sum which the drawee ought to have paid, together with such damages as the law prescribes or allows as an indemnity (*g*).

He also contracts, in the case of a bill payable at a future date, that if the drawee refuse to accept on presentment, he will in like manner pay (*h*).

How declined.

But a man may indorse a bill without incurring personal responsibility in several ways.

By indorsement *sans recours.*

First, by expressing in his indorsement that it is made with this qualification, that he shall not be liable on default of acceptance or payment by the drawee. Such qualified indorsement will be made by annexing in French the words "*sans recours*," or in English, "*without recourse to me*," or any equivalent expression (*i*).

There may, even without an agreement, be an indorsement which confers title without imposing liability, as in the case of an indorsement by an infant (*k*); of an indorsement by directors of a joint stock company not in such a form as to make the company liable.

By agreement, express or implied.

And if there be a written or even a verbal agreement between an indorser and his immediate indorsee, that the indorsee shall not sue the indorser, but the acceptor only, it has been held, that such an agreement is a good defence on the part of the indorser against his immediate indorsee suing in breach of the agreement (*l*).

Indeed, the contract between indorser and indorsee does not consist exclusively of the writing popularly called an indorsement, though that indorsement be a necessary part of it. The contract consists partly of the written indorse-

(*g*) *Suse* v. *Pompe*, 30 L. J., C. P. 75; 8 C. B., N. S. 538, S. C.

(*h*) Such also is the indorser's liability as understood in America (Story on Bills, s. 107).

(*i*) The words "at the indorsee's own risk" have been held in America to exclude the personal responsibility of an indorser. See *Ilice* v. *Stearns*, 3 Mass. Rep. 225; *Mott* v. *Hicks*, 1 Cowen, 512.

(*k*) *Smith* v. *Johnson*, 27 L. J., Exch. 363; 3 H. & N. 222, S. C.

(*l*) *Pike* v. *Street*, 1 M. & M. 226; 1 Dans. & L. 159, S. C.; and see *Clark* v. *Pigott*, 1 Salk. 126; 12 Mod. 192, S. C.; *Goupy* v. *Harden*, 7 Taunt. 159; *Soares* v. *Glyn*, post; see also *Thompson* v. *Clubly*, 1 M. & W. 212; Byles on Bills, 5th American edition, 267.

ment, partly of the delivery of the bill to the indorsee, and may also consist partly of the mutual understanding and intention with which the delivery was made by the indorser and received by the indorsee. That intention may be collected from the words of the parties to the contract, either spoken or written, from the usage of the place, or of the trade, from the course of dealing between the parties, or from their relative situation (*m*).

But though a special contract qualifying the ordinary liability of an indorser may affect the rights of the immediate indorsee, and those who stand merely on his title, it is plain that it cannot restrain the rights of subsequent transferees for value without notice.

By converting blank into special indorsement.

A party transferring a bill may also (as we have just seen) decline personal responsibility, by converting an existing blank indorsement into a special one in favour of his transferee (*n*).

Indorsement may be suspended on a condition.

A bill may be indorsed *conditionally*, so as to impose on the drawee, who afterwards accepts, a liability to pay the bill to the indorsee or his transferees in a particular event only. Where a bill was indorsed on such a condition by the payee, afterwards accepted, then passed through several hands, and was finally paid by the acceptor before the condition was satisfied, it was held that the acceptor was liable to pay the bill again to the payee (*o*). But it seems that a bill cannot be indorsed with a condition that in a certain event the indorsee shall not retain the power of further indorsing over (*p*). And it is clear that parol evidence, or evidence of intention, cannot be allowed to engraft such a condition, so as to affect the title of subsequent holders for value without notice (*q*).

What an indorsement admits.

An indorsement admits the signature and capacity of every prior party (*r*). And in an action against an indorser

(*m*) *Kidson* v. *Dilworth*, 5 Price, 564; *Castrique* v. *Battigieg*, 10 Moore, P. C. Cases, 94. See ante, Chap. VIII. and post, Chap. XIII., and Byles on Bills, 5th American edition, p. 196. *See also ante*

(*n*) As to the liability of an indorser, after non-payment, by the drawee, see post.

(*o*) *Robertson* v. *Kensington*, 4 Taunt. 30; *Sarage* v. *Aldren*, 2 Stark. 232.

(*p*) *Soares* v. *Glyn*, 14 L. J., Q. B. 313; 8 Q. B. 24, S. C.

(*q*) In America, also, it has been held that an indorsement of a note payable on a contingency does not impede the negotiability of the instrument, though it will operate as notice to subsequent holders; Byles on Bills, 5th American edition, p. 268.

(*r*) *Lambert* v. *Oakes*, 1 Lord Raym. 443; 12 Mod. 244; *Lambert* v. *Pack*, 1 Salk. 127; *Williams* v. *Seagrove*, 2 Barnard, 82; *Orichlow* v. *Parry*, 2 Camp. 182; *Free* v. *Hawkins*, Holt, N. P. R.

* Chapter 8 on agreements

CHAPTER XI.

the defendant will not be allowed to plead denying the indorsement to himself (*s*).

Striking out indorsements.

The striking out an indorsement by mistake will not discharge the indorser (*t*), but the striking it out by design will (*u*). Where, in an action by a remote indorsee against the acceptor, if traversed, several indorsements are stated in the declaration, though unnecessarily, they must, in strictness, all be proved (*x*), unless the defendant has, by his conduct, admitted them (*y*). But the plaintiff may omit to state in his declaration all the indorsements after the first indorsement in blank, and aver that the first blank indorser indorsed immediately to himself. In this case, however, all the intervening indorsements should be struck out (*z*). Abbott, C. J.; "All the indorsements must be proved or struck out, although not stated in the declaration. I remember Bayley, J., so ruling, and striking them out himself on the trial; and this need not be done before the trial (*a*); but may be done after the plaintiff has finished his case" (*b*). So, where the action is against an indorser, and there are several indorsements between the payee's indorsement and the defendant's, the plaintiff may state in his declaration that the payee indorsed to the defendant (*c*). It was formerly, therefore, usual in an action on a bill where there were several indorsements, to insert two counts; one setting out the indorsements, to avoid the necessity of striking them out; the other omitting them, so as to prevent a non-suit if they could not be proved. But the wise and ample provisions of the Common Law Procedure Act, as to amendments, now enable a plaintiff to declare safely in a general form, without striking out indorsements, which act may be attended with risk in many cases. It seems doubtful

550; *Macgregor* v. *Rhodes*, 25 L. J., Q. B. 318; but see *East India Company* v. *Tritton*, 3 B. & C. 280; 5 D. & R. 214, S. C.

(*s*) *Macgregor* v. *Rhodes*, 25 L. J., Q. B. 318; 6 E. & B. 266, S. C.

(*t*) *Wilkinson* v. *Johnson*, 3 B. & C. 428; 5 D. & R. 403, S. C. Nor the striking out by mistake of the acceptance. *Raper* v. *Birkbeck*, 15 East, 17; *Novelli* v. *Rossi*, 2 B. & Ad. 757.

(*u*) *Fairclough* v. *Pavia*, 9 Exch. 690.

(*x*) *Waynam* v. *Bend*, 1 Camp. 175.

(*y*) *Bosanquet* v. *Anderson*, 6 Esp. 43; *Sidford* v. *Chambers*, 1 Stark. 326.

(*z*) In an action against an indorser, the plaintiff has no right to strike out indorsements prior to the defendant's, for they constitute the defendant's title to indemnity; Byles on Bills, 5th American edition, p. 268.

(*a*) *Cocks* v. *Barradale*, Chitty, 642, 9th ed.

(*b*) *Mayer* v. *Jadis*, 1 M. & Rob. 247.

(*c*) *Chaters* v. *Bell*, 4 Esp. 210; Selw. 306, 9th ed., S. C.

whether the plaintiff can avail himself of the title of an indorser whose name he has struck out (*d*).

RIGHTS OF INDORSEE.

Fourthly, as to the rights of an indorsee. A transfer by indorsements vests in the indorsee a right of action against all the parties whose names are on the bill, in case of default of acceptance or payment; and we have already seen (*e*), that against an innocent indorsee for value, no prior party can set up the defence of fraud, duress, or absence of consideration. But, if the payee of a bill payable to order neglect to indorse, the holder has no remedy in his own name against any person but him from whom he received it.

Right of transferee to compel indorsement.

If a man have delivered a bill, without indorsing it, where it was upon good consideration agreed or understood that it should be indorsed by him, and afterwards he refuse to indorse, an action may be maintained against him for so refusing (*f*). He, or his personal representatives, may also be compelled by bill in equity to indorse (*g*). But the transferee of an unindorsed bill has no right to sign his transferer's name as indorser (*h*). Nor can he obtain a good title by an indorsement written after notice to him of a fraud (*i*).

Where a bill is re-indorsed to a prior indorser.

If a bill be re-indorsed to a previous indorser, he has, in general, no remedy against the intermediate parties, for they would have their remedy over against him, and the result of the actions would be, to place the parties in precisely the same situation as before any action at all (*j*). But where a holder has previously indorsed, and the subsequent intermediate indorser has no right of action or remedy on that previous indorsement against the holder, there are cases in which the holder may sue the intermediate indorser (*k*).

(*d*) *Davies* v. *Dodd*, 1 Wils. Exch. 110; 4 Price, 176, S. C.; and see *Bartlett* v. *Benson*, 15 L. J., Exch. 23; 3 D. & L. 274; 14 M. & W. 733, S. C.

(*e*) Chapter on CONSIDERATION.

(*f*) *Rose* v. *Sims*, 1 B. & Ad. 521.

(*g*) *Watkins* v. *Maule*, 2 Jac. & Walker, 242; *Smith* v. *Pickery*, Peake, 50; *Rolleston* v. *Hibbert*, 3 T. R. 411; *Ex parte Rhodes*, 3 Mont. & Ayr. 217; *Ex parte Greening*, 13 Ves. 206; *Edge* v. *Rumford*, 31 L. J., Ch. 805; 31 Beav. 247, S. C.

(*h*) *Harrop* v. *Fisher*, 30 L. J., C. P. 283; and see *Moxon* v. *Pulling*, 4 Camp. 50; Story on Bills of Exchange, s. 201; *Rose* v. *Sims*, 1 B. & Ad. 521.

(*i*) *Whistler* v. *Fowler*, 14 C. B., N. S. 248; 32 L. J., C. P. 161.

(*j*) *Bishop* v. *Hayward*, 4 T. R. 470; *Britten* v. *Webb*, 2 B. & C. 483; 3 D. & R. 650, S. C.

(*k*) *Wilders* v. *Stevens*, 15 L. J., Exch. 108; 15 M. & W. 208, S. C.; *Williams* v. *Clarke*, 16 M.

CHAPTER XI.

And if the plaintiff declare, as he may do, on an indorsement from the first blank indorser to himself, it will, it seems, be intended that he means to rely on his first title, and it is doubtful whether he can reply any facts arising on the intervening indorsements without a departure (*l*).

Where the indorser is a trustee.

But where a bill or note is merely indorsed to another, and deposited with him as a trustee, he can only use it in conformity with the stipulations on which he became the depositary of it (*m*).

If the depositary of the bill indorse it over in breach of trust, the indorsee, with notice of the breach of trust, can acquire no title to the bill as against the rightful owner, and can neither sue him on the bill, nor hold the bill against him (*n*). Therefore, where the acceptor of a bill, who had received no value, delivered the bill to the drawer, desiring him to hold it for his use, but the drawer indorsed it for value to the defendant, who knew that the drawer had no authority to part with it, the defendant, the indorsee, was held liable to the acceptor in trover. "The drawer," says Lord Tenterden, "having put the bill into the defendant's hands, when the defendant knew that the drawer had no authority so to do, the defendant's title is no better than the drawer's. But then, it is said, allowing that the plaintiff had a property in the bill, the defendant had a right to hold it, because he may sue the drawer. I think the defendant had no right to hold it as against the acceptor, the plaintiff, because the defendant took the bill with the knowledge that the person from whom he took it had no title to it as against the plaintiff" (*o*).

So where the drawer of a bill of exchange deposited it with a creditor, and gave him authority to receive the proceeds and apply them in a specified way, and the drawer afterwards committed an act of bankruptcy, on which a commission issued, the creditor having, after the act of bankruptcy, delivered the original bill to the acceptor, and taken in lieu of

& W. 834; *Smith* v. *Marsack*, 18 L. J., C. P. 65; 6 C. B. 486, S. C.; *Morris* v. *Walker*, 19 L. J., Q. B. 400; 15 Q. B. 589, S. C. And to reply the facts is no departure. Ibid., and Story on Promissory Notes, s. 479.

(*l*) *Bartlett* v. *Benson*, 15 L. J., Exch. 23; 14 M. & W. 733, S. C.

(*m*) As to the consideration where the bill is deposited as security for the balance of a running account, see ante, CONSIDERATION.

(*n*) *Goggerly* v. *Cuthbert*, 2 N. R. 170. If the acceptor be compelled to pay he may sue the depositary. *Bleaden* v. *Charles*, 7 Bing. 246; and see *Osborn* v. *Donald*, 12 W. R. 839.

(*o*) *Evans* v. *Kymer*, 1 B. & Ad. 528.

it another bill, it was held by Tindal, C. J., that the creditor had been guilty of a conversion, and the assignees of the bankrupt might recover against him in trover (*p*). But it would have been otherwise, if the creditor had merely received the money, for that would not have amounted to a conversion (*q*). Where a bill has been indorsed in blank, and the transferee of the depositary takes it without knowledge of the particular and limited purpose for which the bill was deposited with the trustee, the transferee acquires a title (*r*); and the transferee's title will not now be affected by proving him guilty of negligence, however gross, if there were no fraud. Gross negligence may, however, be evidence of fraud (*s*). And it is conceived, that if the bill had not become payable to bearer, but was transferable only by indorsement of the trustee, an indorsement by him in breach of trust to an indorsee for value, and without notice, would in general confer a title.

Restrictive indorsements.

The trust may be expressed on the bill itself by a restrictive indorsement, or a restrictive direction appended to the payee's name, so that, into whose hands soever the bill may travel, it will carry a trust on the face of it (*t*).

The following have been held to be restrictive directions or indorsements:—"The within must be credited to A. B." (*u*); "Pay to A. B. or order, for my use;" "Pay to A. B. for my account;" "Pay to A. B. only." But the words, "Value in account with the Oriental Bank," have been held not to be a restrictive indorsement (*x*).

A man who takes a bill, the circulation of which beyond the restricted indorsee has been restrained by a restrictive direction or indorsement, cannot sue the drawer or acceptor upon it, but holds the bill or the money received by him as

(*p*) *Robson* v. *Rolls*, 1 M. & Rob. 239.

(*q*) *Jones* v. *Fort*, 9 B. & C. 764; 4 M. & Ry. 547, S. C.

(*r*) *Bolton* v. *Puller*, 1 B. & P. 539; *Ramsbottom* v. *Cator*, 1 Stark. 228; *Collins* v. *Martin*, 1 B. & P. 648; *Gorgier* v. *Mieville*, 3 B. & C. 45; 4 D. & R. 641, S. C.; *Wookey* v. *Pole*, 4 B. & A. 1; and see *Roberts* v. *Eden*, 1 B. & P. 398.

(*s*) *Goodman* v. *Harvey*, 4 Ad. & E. 870; 6 N. & M. 372, S. C.; *Uther* v. *Rich*, 10 Ad. & E. 784; 2 Per. & D. 579, S. C.

(*t*) Such restrictive indorsements are not of very late invention, but they appear to have been well known before the middle of the last century. *Snee* v. *Prescot*, 1 Atk. 247; *Edie* v. *East India Company*, 2 Burr. 1227; 1 W. Bl. 295, S. C.

(*u*) *Ancher* v. *Bank of England*, Doug. 637; *Edie* v. *East India Company*, 2 Burr. 1227; *Evans* v. *Cramlington*, Carthew, 5; *Cramlington* v. *Evans*, 2 Vent. 307, S. C.; *Treuttel* v. *Barandon*, 8 Taunt. 100; 1 Moore, 543, S. C.

(*x*) *Murrow* v. *Stuart*, 8 Moore, P. C. Cases, 267; *Buckley* v. *Jackson*, L. R., 3 Ex. 135.

CHAPTER XI.

the trustee of the restraining party, and is liable to refund the bill or money received upon it to the party making the restrictive indorsement. For such words cannot be intended as a mere private direction to the immediate indorsee; seeing that he is bound to account for the bill without any such direction; not to mention that the most obvious mode of conveying a private direction, would be either by oral communication, or by a letter enveloping the bill. Nor can they be a mere direction to the drawee not to pay the original restricted indorsee: for a restrictive indorsement constitutes the restricted indorsee the indorser's agent to receive the money, and for its misapplication, when so paid, the drawee is not responsible. As between the restraining indorser, therefore, the immediate indorsee, and the drawee, the words "*to my use*," or the like, are of no effect. But as between the restraining indorser and a subsequent indorser, and the drawee, they are a notification that the restricted indorsee has no property in the bill, that he is a mere trustee for his principal, and that he can appoint no sub-agent, except for the purpose of holding the bill or the money upon a similar trust. The subsequent indorsee, therefore, being a mere agent, can have no action on the bill if it is dishonoured, nor hold it, or the money received upon it, against the principal: and if, instead of paying the money to the principal he chooses to pay it to the intermediate agent, he becomes responsible for its misapplication, and so does any one who pays it to him.

A bill was indorsed by the payee in this form:—"Pay A. B., or order, for the account of C. D.;" A. B. pledged it with the defendant, who advanced money upon it to A. B. personally. Held, that the defendant had sufficient notice, from the indorsement, that A. B. had no authority to raise money on the bill for his own benefit, and, therefore, could not defend an action of trover for the bill, brought by C. D., his principal (*y*).

A., a merchant at Boston, in New England, remitted a bill to B., his agent in London, indorsing it in this form:—"*Pay B., or his order, for my use.*" B. discounted it with his bankers: he afterwards failed, and the bankers, to whom he was indebted in more than the amount of the bill, received payment of it at maturity from the acceptors. Held, in an action for money had and received, that the bankers were liable to refund the money to A. (*z*).

(*y*) *Treuttel* v. *Barandon*, 8 Taunt. 100; 1 Moore, 543, S. C.

(*z*) *Sigourney* v. *Lloyd*, 8 B. & C. 622; affirmed in the Exchequer Chamber, 5 Bing. 525; 3 Y. & J. 220, S. C.

We have already seen that the omission of the words "*or order*," in a special indorsement, will not restrain the negotiability of a bill (*a*).

LIABILITY OF PARTY TRANSFERRING BY DELIVERY.

Fifthly. As to the liability of a person transferring by delivery only.

No liability on the instrument.

A transfer by mere delivery, without indorsement, of a bill of exchange or promissory note made or become payable to bearer, does not render the transferer liable *on the instrument* to the transferee.

Nor in general on the consideration.

And it is conceived to be the general rule of the English (*b*) law, and the fair result of the English authorities, that the transferer is not even liable to refund the consideration, if the bill or note so transfered by delivery without indorsement turn out to be of no value, by reason of the failure of the other parties to it. For the taking to market of a bill or note payable to bearer without indorsing it, is *primâ facie* a sale of the bill. And there is no implied guarantee of the solvency of the maker, or of any other party (*c*).

Where the bill is considered as sold.

If a bill or note, made or become payable to bearer, be delivered without indorsement, not in payment of a pre-existing debt, but by way of exchange for goods, for other bills or notes, or for money transferred to the party delivering the bill at the same time, such a transaction has been repeatedly held to be a sale of the bill by the party transferring it, and a purchase of the instrument, with all risks,

(*a*) *Moore* v. *Manning*, Com. 311; *Acheson* v. *Fountain*, 1 Stra. 557; *Edie* v. *East India Company*, 2 Burr. 1216; 1 W. Bl. 295, S. C.

(*b*) In America also it has been repeatedly held, that payment in bank notes *after the bank has failed*, the fact being unknown both to payer and receiver, is good, and the loss falls on the receiver. *Bayard* v. *Shunk*, 1 Watts & Serg. 92; *Young* v. *Adams*, 6 Mass. 182—185; *Scruggs* v. *Gass*, 8 Yerger, 115; *Lowry* v. *Murrell*, 2 Porter, 282. The contrary, however, has been also held. *Lightbody* v. *Ontario Bank*, 11 Wend. 1; affirmed on error in 13 Wend. 107; *Harley* v. *Thornton*, 2 Hill, 509; *Fogg* v. *Sawyer*, 9 New Hamp. 365; see Story on Promissory Notes, p. 125. It is conceived that the confusion has arisen from neglecting to distinguish between the abstract question of law and questions of fact in the particular case.

(*c*) See the observations of Littledale, J., in *Camidge* v. *Allenby*, 6 B. & C. 373, and *Rogers* v. *Langford*, 1 C. & M. 637, 642. See also the observations of Mr. Baron Bramwell, delivering the judgment of the Court of Exchequer, in *Guardians of the Lichfield Union* v. *Greene*, 26 L. J. 140; 1 H. & N. 884, S. C.; *Smith* v. *Mercer*, L. R., 3 Ex. 51.

CHAPTER XI.

by the transferee. "It is extremely clear," says Lord Kenyon, "that, if the holder of a bill send it to market without indorsing his name upon it, neither morality nor the laws of this country will compel him to refund the money for which he sold it, if he did not know at the time that it was not a good bill" (*d*). So, where A. gave a bankrupt, before his bankruptcy, cash for a bill, but refused to allow the bankrupt to indorse it, thinking it better without his name, and afterwards, on dishonour of the bill, proved the amount under the commission, the Lord Chancellor ordered the debt to be expunged, observing, that this was a sale of the bill (*e*). So, if a party discounts bills with a banker, and receives in part of the discount other bills, but not indorsed by the banker, which bills turn out to be bad, the banker is not liable. "Having taken them without indorsement," says Lord Kenyon, "he has taken the risk on himself. The bankers were the holders of the bills, and, by not indorsing them, have refused to pledge their credit to their validity; and the transferee must be taken to have received them on their own credit only" (*f*). So, where, in the morning, A. sold B. a quantity of corn; and, at three o'clock in the afternoon of the same day, B. delivered to A. in payment certain promissory notes of the bank of C., which had then stopped payment, but which circumstance was not at the time known to either party, Bayley J., said, "If the notes had been given to A. at the time when the corn was sold, he could have had no remedy upon them against B. A. might have insisted on payment in money, but, if he consented to receive the notes as money, they would have been taken by him at his peril" (*g*).

Such seems the general rule governing the transfer by delivery, not only of ordinary bills of exchange and promissory notes, but also of bank notes (*h*). Nor is there any

(*d*) *Fenn* v. *Harrison*, 3 T. R. 759; and see *Evans* v. *Whyle*, 5 Bing. 485; 3 M. & P. 130, S. C.

(*e*) *Ex parte Shuttleworth*, 3 Ves. 368.

(*f*) *Fydell* v. *Clark*, 1 Esp. 447; *Bank of England* v. *Newman*, 1 Ld. Raym. 442; 12 Mod. 241; Com. 57; *Emly* v. *Lye*, 15 East, 7. But in *Ex parte Blackburne*, 10 Ves. 204, the Chancellor seemed to think, that, if goods are purchased and paid for at the time by bills not indorsed, the vendee is liable, if the bills turn are out bad. See *Jones* v. *Ryde*, 5 Taunt. 487; 1 Marsh. 157, S. C.; *Owenson* v. *Morse*, 7 T. R. 64.

(*g*) *Camidge* v. *Allenby*, 6 B. & C. 373; 9 D. & R. 391, S. C.; see *Robson* v. *Oliver*, 10 Q. B. 704; and see *Ward* v. *Evans*, 2 Ld. Raym. 928, and *Rogers* v. *Langford*, 1 C. & M. 637.

(*h*) Though they be country bank notes, issued by the payer himself, when the question arises in favour of sureties. *Guardians of Lichfield Union* v. *Greene*, 26 L. J., Exch. 140; 1 H. & N. 884, S. C.

hardship in such a rule, for the remedy against the transferer may always be preserved by indorsement, or by special contract. The rule, however, is not without exceptions.

Unless the bill or note be given for a pre-existing debt.

If a banker's note be given on account of a pre-existing debt, the note is not to be considered as sold (*i*). But if the banker fail and if the note be duly presented, and due notice be given of the dishonour, the remedy for the antecedent debt revives. "I agree," says Holt, C. J., "the difference taken by my brother Darnell, that taking a note for goods sold is a payment, because it was a part of the original contract, but paper is no payment where there is a precedent debt. For when such a note is given in payment, it is always taken to be given under this condition to be payment, if the money be paid thereon in convenient time" (*j*). The principle of the exception may be this. A creditor is entitled to cash. If, instead of cash, he consent to take notes, not being a legal tender, that is a favour to the debtor, and it will thence be inferred, in the absence of evidence to the contrary, that the notes were not to be payment, if, without the fault of the creditor, they turn out to be of no value.

Other exceptions to the general rule.

And it is conceived, that as an express contract would make the transferer liable without indorsement, so there are other circumstances from which a jury may infer that the intention, and *implied* contract of the parties was, that the notes were not to be payment, if dishonoured (*k*).

If, for example, a man ask another to change a bank note for him as a favour, and the banker fail, it is conceived that a jury would be justified in inferring an implied contract to refund the change, if the note were duly presented and dishonoured, and due notice given (*l*); and it has been

(*i*) See as to this exception, however, the language of Lord Campbell, in *Timmins* v. *Gibbins*, infra.

(*j*) *Ward* v. *Evans*, 2 Ld. Raym. 928; *Camidge* v. *Allenby*, 6 B. & C. 373. So held also by Pratt, C. J., in *Moore* v. *Warren*, 1 Stra. 415, and by King, C. J., in *Holme* v. *Barry*, 1 Stra. 415. In the case of a pre-existing debt paid by notes, if the notes be not paid, and the debtor is held liable, there is no doubt as to the original debt for which he is so liable, and there is no need to invent or imply any contract to make out that debt. But where goods are exchanged against money, if the payer is held liable, it is difficult to imply a contract for goods sold and delivered, to be paid for on request.

(*k*) See *Van Wart* v. *Woolley*, 3 B. & C. 446, and post, Ch. XXII. There is no warranty that the stamp on a foreign bill has been cancelled. *Pooley* v. *Browne*, 11 C. B., N. S. 566.

(*l*) See *Rogers* v. *Langford*, 1 C. & M. 637; *Turner* v. *Stones*, 1 D. & L. 122; *Ex parte Isbester*, 1 Rose, 23; *Woodland* v. *Fear*, 7 E. & B. 522.

CHAPTER XI

held that if a customer pay to his account with his banker notes of a bank which has failed, and the banker is guilty of no laches; the loss falls on the customer (*m*). And if a banker cashes a check on another bank which has failed, he may recover back his money (*n*). In all cases where the receiver of the notes seeks to return them he must do so within a reasonable time (*o*).

To an agent of a foreign principal.

The sellers of bills on the London market do not, *primâ facie*, trust the foreign principal of the English buyer (*p*).

Warranty of genuineness.

A transferer, by delivery, though he does not impliedly warrant the solvency of the parties to a promissory note or bill of exchange, does warrant that the bill or note is not forged or fictitious (*q*). And if the bill or note does not in this respect fully answer the warranty (though some signatures be genuine), yet the consideration entirely fails, and the money given for the bill may be recovered back (*r*), provided it be claimed within a reasonable time (*s*).

No liability to subsequent transferee.

A transferee, by delivery, cannot be liable in any case to a subsequent transferee, either on the instrument or the consideration. And therefore it has been held that such subsequent transferee cannot prove for the value in the event of the first transferer's bankruptcy (*t*).

(*m*) *Timmins* v. *Gibbins*, 18 Q. B. 722.

(*n*) *Woodland* v. *Fear*, 26 L. J., Q. B. 202; 7 E. & B. 519, S. C.

(*o*) See *Rogers* v. *Langford*, 1 C. & M. 642.

(*p*) *Poirier* v. *Morris*, 2 E. & B. 103.

(*q*) *Jones* v. *Ryde*, 5 Taunt. 487; 1 Marsh. 157, S. C.; *Young* v. *Cole*, 3 Bing. N. C. 724; *Bruce* v. *Bruce*, 1 Marsh. 165; 5 Taunt. 495; *Fuller* v. *Smith*, Ryan & M. 49; *Gurney* v. *Womersley*, 4 E. & B. 133. So it has been repeatedly held in America. *Ellis* v. *Wild*, 6 Mass. 321; *Young* v. *Adams*, ibid. 182; *Markle* v. *Hatfield*, 2 John. R. 455; *Eagle Bank of Newhaven* v. *Smith*, 5 Con. R. 71; *Strange* v. *Ellison*, 2 Bayley, 385; though the instrument be sold, Byles on Bills, 5th American edition, p. 278. Mr. Justice Story lays it down that there is also a warranty of the title of the transferer. Treatise on Promissory Notes, p. 123. But it is conceived that that is not so. Indeed, an honest transferee by delivery needs no such warranty. See further as to transfer of a forged or altered bill, the Chapters on FORGERY and ALTERATION. He also warrants that a bill purporting to be a foreign bill, and therefore not to require a stamp, was really made abroad. *Gompertz* v. *Bartlett*, 23 L. J., Q. B. 65; 2 E. & B. 854, S. C.

(*r*) *In re Barrington*, 2 Sch. & Lef. 112.

(*s*) *Pooley* v. *Browne*, 31 L. J., C. P. 135.

(*t*) *Gurney* v. *Womersley*, 4 E. & B. 133.

But, in all cases, if notes or bills are transferred as valid, when the transferer knows they are good for nothing, the suppression of the truth is a fraud, and he is liable. "If," continues Mr. Justice Bayley, in the case before referred to, "A. could show fraud or knowledge of the maker's insolvency in the payer, then it would be wholly immaterial whether the notes were taken at the time of sale or afterwards" (*u*).

Effect of fraud.

Sixthly, as to the rights of transferee by delivery.

RIGHTS OF TRANSFEREE BY DELIVERY.

Bills and notes payable to bearer circulate as money, and are considered as such. The *bonâ fide* possessor is, therefore, the true owner. For it is essential to the currency of money that property and possession should be inseparable (*x*). We have already seen that the indorsee of a bill payable to order, and not made payable to bearer by a blank indorsement, has no right to the bill, either so as to retain it against the real owner, or to sue any party upon it, unless the indorser had a right to endorse (*y*). Whereas, if the check, bill, or note, be originally made or have since duly become payable to bearer, the title of the holder, both as against a former owner on the one hand, and against the maker, acceptor, or indorser on the other, is not affected by any infirmity in the title of the transferer, provided the holder took it *bonâ fide* for value.

Former effect of negligence in the transferee.

It was formerly considered that the transferee's title would be affected by want of due caution on his part, and that he would be liable in trover to the real owner, and unable to enforce payment against the parties to the instrument, if he were guilty of negligence in taking it. Thus, where a banker, in a small market town, changed a 500*l.* Bank of England note for a stranger, without any further inquiry than merely asking his name, he was held liable, in trover, to a party from whom the note had been unlawfully obtained; Best, C. J., observing, "The party's caution should increase with the amount of the note which he is called upon to change (*z*). A man may change a 20*l.* note without asking a single question, but would that be right as to

(*u*) *Camidge* v. *Allenby*, 6 B. & C. 373; 9 D. & R. 391, S. C.; *Fenn* v. *Harrison*, 3 T. R. 759.

(*x*) See *Foster* v. *Green*, 31 L. J., Exch. 158.

(*y*) *Mead* v. *Young*, 4 T. R. 28.

(*z*) *Snow* v. *Peacock*, 2 C. & P. 221; and see *Gill* v. *Cubitt*, 3 B. & C. 466; 5 D. & R. 324, S. C.; *Egan* v. *Threlfall*, 5 D. & R. 326.

CHAPTER XI.

one of several thousands? More caution is required in the case of a discounter than of a payer" (*a*).

Present effect of negligence or fraud.

But it is now settled, that if a man takes *honestly* an instrument made or become payable to bearer, he has a good title to it, with whatever degree of negligence he may have acted, unless his gross negligence induce the jury to find fraud. "I believe," says Lord Denman, "we are all of opinion that gross negligence only would not be a sufficient answer by the defendant where the plaintiff has given consideration for the bill. Gross negligence may be evidence of *mala fides*, but it is not the same thing. We have shaken off the last remnant of the contrary doctrine" (*b*).

Title of an agent.

If the party presenting a bill or note payable to bearer be the mere agent of another, the agent's title is infected with the infirmity of his principal's title, although the principal is in the agent's debt; and the agent consequently cannot enforce payment of the maker (*c*).

Pledging bills payable to bearer.

It makes no difference that the bill or note is only pledged, and not absolutely transferred; the pawnee acquires a property in it (*d*), and is not liable in trover, to the real owner, as in the case of goods improperly pledged (*e*).

Other instruments payable to bearer.

Exchequer bills, which are payable to bearer before the blank is filled up (*f*), bonds of foreign princes and states

(*a*) *Query*, whether this last proposition is not now incorrect?

(*b*) *Goodman* v. *Harvey*, 4 Ad. & El. 870; 6 N. & M. 372, S. C.; *Uther* v. *Rich*, 10 Ad. & E. 784; 2 P. & D. 579, S. C. In the case of *Goodman* v. *Harvey*, the bill bore on it, when discounted, the notarial mark of non-acceptance. To use the words of the Lord Chief Justice, "the plaintiff received the bill with a death wound apparent on it." See also *Backhouse* v. *Harrison*, 5 B. & Ad. 1098; 3 N. & M. 188; *Crook* v. *Jadis*, 5 B. & Ad. 909; 3 N. & L. 257, S. C.; *Foster* v. *Pearson*, 1 C., M. & R. 855; 5 Tyr. 255, S. C.; *Willis* v. *Bank of England*, 4 A. & E. 21; *Raphael* v. *Bank of England*, 17 C. B. 161; *Carlon* v. *Ireland*, 5 E. & B. 765; *Bank of Bengal* v. *Fagan*, 7 Moore, P. C. C. 72.

(*c*) *Solomons* v. *Bank of England*, 13 East, 135; 1 Rose, 99, S. C. As to agent transgressing his authority, see *Watson* v. *Russell*, 34 L. J., Q. B. 93.

(*d*) *Barber* v. *Richards*, 20 L. J., Exch. 135.

(*e*) *Collins* v. *Martin*, 1 Bos. & Pul. 648; 2 Esp. 520, S. C. See as to lien of banker, post.

(*f*) *Wookey* v. *Pole*, 4 B. & Ald. 1; see as to dividend warrants, *Partridge* v. *Bank of England*, 13 L. J., Q. B. 281, and 9 Q. B. 424, in error; and see further as to Exchequer bills, *Barnett* v. *Brandao*, 6 M. & G. 630; *Brandao* v. *Barnett*, 3 C. B. 519. In the state of Georgia it has been held, that any bond payable to bearer is a negotiable instrument, Byles on Bills, 5th American edition, p. 281.

payable to bearer (*g*), and East India bonds (*h*), resemble money and bills of exchange payable to bearer, in the necessary union of possession and property. Honest acquisition confers title (*i*).

Metallic tokens.

A metallic token, like an I O U, should seem at common law to be only evidence of a debt. Though intended for circulation it can therefore at common law give no right of action to a transferee.

But the issuer of tokens made of mixed metals, compounded partly of gold or silver, was formerly liable to the holder (*k*).

The issuer of a token, made wholly or in part of copper, is liable only to the original taker (*l*).

The issuing of tokens made partly of gold or silver was restrained by the 53 Geo. 3, c. 114 (now repealed by the 24 & 25 Vict. c. 101), and the issuing of tokens made wholly or partly of copper by the 57 Geo. 3, c. 46.

Tokens into the composition of which neither the precious metals or copper enter, seem left to the common law.

Wages of artificers, however, cannot in certain trades, even by consent, be paid in tokens (*m*).

Seventhly, as to transfer under peculiar circumstances.

TRANSFER UNDER PECULIAR CIRCUMSTANCES.

Before bill filled up.

An indorsement may be made even before the bill or note itself, and so render the indorser liable to subsequent parties to any amount warranted by the stamp. The plaintiffs were bankers, with whom one G. had dealings. They refused to let him have more money, unless he procured them the indorsement of a third person. G. accordingly induced the defendant to sign his name across the back of four blank forms of promissory notes. G. then filled them up, and delivered them to the plaintiffs, who knew the notes were blank at the time of the indorsement. The notes were not paid by G., the maker, and the plaintiffs called on the defendant as indorser. Lord Mansfield: "Nothing is so clear, as that the indorsement on a blank note is a letter of

(*g*) *Gorgier* v. *Mieville*, 3 B. & C. 45; 4 D. & R. 641, S. C.; *Jones* v. *Peppercorn*, 28 L. J., Ch. 158; 1 Johnston, 430, S. C.

(*h*) 51 Geo. 3, c. 64.

(*i*) The embezzling of bills by agents, or pledging them beyond their lien, is a misdemeanor punishable by penal servitude or imprisonment, 24 & 25 Vict. c. 96, s. 75. As to LOST BILLS, see the Chapter on that subject.

(*k*) 53 Geo. 3, c. 114, s. 3. This statute is repealed by 24 & 25 Vict. c. 101.

(*l*) 57 Geo. 3, c. 46.

(*m*) 1 & 2 Will. 4, c. 37.

CHAPTER XI.

credit for an indefinite sum. The defendant said, 'Trust G. to any amount, and I will be his security.' It does not lie in his mouth to say the indorsements were not regular" (*n*).

After refusal to accept, where the transferee has notice of the dishonour.

An indorsement may be made either before or after acceptance. If a bill be indorsed after refusal to accept, and notice thereof to the indorsee, or after it is due, these are circumstances which may reasonably excite suspicions as to the liability or solvency of the antecedent parties. An indorsee, therefore, of a bill dishonoured or after due, with notice thereof, has not all the equity of an indorsee for value in the ordinary course of negotiation. He is held to take the bill on the credit of his indorser, and has no superior title against the other parties (*o*).

Drawer requested defendant to indorse two bills for his, the drawer's accommodation. He accordingly drew two in favour of the defendant, which defendant indorsed and gave up to him. These bills the drawer then gave to A., and A. signed an agreement with defendant, that if one of the bills were paid, the defendant should be exonerated from the other. One of them the defendant accordingly did pay. The other was presented for acceptance and dishonoured; it was, after this, indorsed by A. to the plaintiffs, with notice of the dishonour. On payment being refused, plaintiffs sued defendant. Held, that the plaintiffs, having taken the bill after notice of dishonour, took the title of their indorser, and that, as the agreement would have been a defence to an action at the suit of A., it was a defence also against the plaintiffs (*p*).

Where the transferee has no notice.

But if the indorsee had no notice of the dishonour, he is not prejudiced by it. Payee presented a bill for acceptance, which was refused. He neglected to advise the drawer, and thereby discharged the drawer as between the drawer

(*n*) *Russell* v. *Langstaffe*, Doug. 496; and this seems to be the law in America, though the amount of liability is not there limited by any stamp laws; Byles on Bills, 5th American edition, pp. 282 and 307; *Usher* v. *Dauncy*, 4 Camp. 97. A bill may be indorsed before the day of its date. *Passmore* v. *North*, 13 East, 517; and see *Smith* v. *Mingay*, 1 M. & Sel. 87; *Cruchley* v. *Clarence*, 2 M. & Sel. 90; and see 17 Geo. 3, c. 30, s. 1; and *Schultz* v. *Astley*, 2 Bing. N. C. 544; 2 Scott, 815; 1 Hodges, 525, S. C. See acceptance on a blank stamp, post, Chapter on ACCEPTANCE.

(*o*) But as to a bill payable to bearer, see *Goodman* v. *Harvey*, 4 Ad. & El. 870; 6 N. & Man. 372, S. C.; *Raphael* v. *Bank of England*, 17 C. B. 161; *Carlon* v. *Ireland*, 5 E. & B. 765.

(*p*) *Crossley* v. *Ham*, 13 East, 498.

and himself. He then indorsed the bill without informing his indorsee of the dishonour. Held, that the discharge to the drawer extended only to an action at the suit of the party guilty of the neglect, and that the indorsee having had no notice of the dishonour, the same defence was not available against him as against his indorser (*q*).

After due.

"After a bill or note is due" (*r*), says Lord Ellenborough, "it comes disgraced to the indorsee, and it is his duty to make inquiries concerning it. If he take it, though he give a full consideration for it, he takes it on the credit of the indorser, and subject to all the (*s*) equities with which it may be incumbered." Thus, where the defendant made a promissory note for the accommodation of the payee, and the payee indorsed it, overdue to A., and A. indorsed it to the plaintiff, it was formerly held that, as the absence of consideration would have been a good defence against the payee, it was also available both against A. and the plaintiff (*t*).

It now, however, seems that the original absence of consideration, in the case of *accommodation* acceptances, the object of which is to raise money, will not defeat the title of an indorsee for value of an overdue bill or note, even al-

(*q*) *O'Keefe* v. *Dunn*, 6 Taunt. 305; 1 Marsh, 613, S. C.; affirmed in the K. B., 5 M. & S. 282; and see *Whitehead* v. *Walker*, 11 L. J., Exch. 168; 9 M. & W. 506, S. C., and *Bartlett* v. *Benson*, 14 M. & W. 733; 3 D. & L. 274; 15 L. J., Exch. 23, S. C.

(*r*) It is apprehended that wherever it is alleged that a bill was indorsed when overdue, or under any other peculiar circumstances, it lies on the party averring the fact to prove it on the general principle, *Ei incumbit probatio qui dicit.*" See post.

(*s*) In *Sturtevant* v. *Ford*, 4 M. & G. 101, Cresswell, J., says, "Perhaps the better expression would be, that he takes the bill subject to all *its* equities."

(*t*) *Tinson* v. *Francis*, 1 Camp. 19; *Brown* v. *Davis*, 3 T. R. 80; 7 T. R. 429; sed vide *Charles* v. *Marsden*, 1 Taunt. 224; *Atwood* v. *Crowdie*, 1 Stark. N. P. 483; Bayley, 6th ed. 161; Chitty, 9th ed. 218; Roscoe, 386. *Quære*, whether this were at any time the law, supposing a bill to have been *accepted* after it became due. See *Stein* v. *Yglesias*, 1 C., M. & R. 565; 3 Dowl. 252; 1 Gale, 98, S. C. So stood the authorities till very lately. But the Court of C. P., in *Sturtevant* v. *Ford*, and the Court of Q. B. in *Lazarus* v. *Cowie*, and perhaps the Court of Exch. in *Stein* v. *Yglesias*, ante, have recently upheld the authority of *Charles* v. *Marsden*, and it should now seem that an original absence of consideration in the case of an accommodation bill, is not one of those equities which attach on the instrument and defeat the title of an indorsee for value of an overdue bill, although with notice of the fact. See *Carruthers* v. *West*, 11 Q. B. 143, and *Ex parte Swan*, L. R., 6 Eq. 345. Some inclination to re-consider the modern rule seems, however, to have been evinced by the Exch. Chamber in *Jewell* v. *Parr*, 16 C. B. 684.

CHAPTER XI.

though the indorsee had notice of the fact when he took the bill, unless there were an agreement, express or implied, restraining the negotiation of the bill or note after it should become due (*u*).

A bill or note assigned in due time on the day of payment is to be considered as assigned before it is due (*x*).

The assignee of an overdue bill or note is not affected by an infirmity in the title of an original or antecedent party, if his immediate assignor could have maintained an action. A bill was accepted on a smuggling transaction, indorsed before it was due to a *bonâ fide* holder for value, and by the latter indorsed, after due, to the plaintiff. Held, that as the indorser might have sustained an action against the acceptor, so could his indorsee (*y*).

An indorsee of an overdue bill or note is liable to such equities only as attach on the bill or note itself, and not to claims arising out of collateral matters (*z*). Therefore the indorsee of an overdue note is not liable to a set-off due from the payee to the maker (*a*). And although the indorsee had notice, gave no consideration, and took the bill on purpose to defeat the set-off (*b*). Yet it should seem, that where a negotiable instrument is deposited as a security for the balance of accounts, and is afterwards indorsed overdue, in an action by the indorsee against the party originally liable, the state of the account may be gone into (*c*). And where there has been an agreement for a set-off, the transfer of the bill overdue will not defeat it (*d*).

Where the bill is deposited as a security for the balance of a running account, but at the time when the bill becomes due the balance is in favour of the depositor, and the bill is not withdrawn by him, and afterwards the balance shifts in

(*u*) *Sturtevant* v. *Ford*, 4 M. & G. 101; *Lazarus* v. *Cowie*, 3 Q. B. 459; and see *Stein* v. *Yglesias*, 1 C., M. & R. 565.

(*x*) Byles on Bills, 5th American edition, p. 285.

(*y*) *Chalmers* v. *Lanion*, 1 Camp. 383; *Fairclough* v. *Pavia*, 9 Exch. 690.

(*z*) *Holmes* v. *Kidd*, in error, 28 L. J. 113; 3 H. & N. 891.

(*a*) *Burrough* v. *Moss*, 10 B. & C. 558; 5 M. & R. 296, S. C.; *Stein* v. *Yglesias*, 1 C., M. & R. 565; 3 Dowl. 252; 1 Gale, 98, S. C. It has been thought that the indorsee would be affected by the set-off if he have notice of it at the time he takes the bill. *Goodall* v. *Ray*, 4 Dowl. 76. But it is now clear that notice makes no difference. *Whitehead* v. *Walker*, 11 L. J., Exch. 168; 9 M. & W. 506, S. C.; and *Ex parte Swan*, L. R., 6 Eq. 345.

(*b*) *Oulds* v. *Harrison*, 24 L. J., Exch. 66; 10 Exch. 572, S. C.

(*c*) *Cullenridge* v. *Farquharson*, 1 Stark. 259; and see the observations of Mr. Baron Parke on this case in *Oulds* v. *Harrison*, ubi supra.

(*d*) Ibid.

favour of the depositary, the depositary is not to be considered as the transferee of an overdue bill (*e*).

Transfer of an overdue check.

This rule also applies to bankers' checks, transferred a long time after they are issued. The owner of a check on a banker for 50*l*., having lost it, the check was paid five days after its date to a shopkeeper, who received the amount at the bank. Held, that the shopkeeper was liable to refund the money to the owner of the check; for, having taken it after due, he acquired no better title than the party from whom he took it, and that it lay on him to show that his assignor had a title. "A check," says Mr. Justice Holroyd, "is payable immediately, the holder of it keeps it at his peril, and a person taking it after it is due takes it also at his peril" (*f*).

But a distinction has been taken between the transfer of a bill or note payable at a fixed period and overdue, and the transfer of a check some days old. For, in the case of such a bill or note, there is a fixed time for payment, after which it cannot possibly circulate without some suspicion; but there is no such fixed time in the case of a check. And, therefore, it has been held, that though the taking of a check six days old is a circumstances from which the *jury may infer* fraud, it is not conclusive evidence, so as to prevent the party taking the check from suing on it, or retaining it, or the money received upon it (*g*).

Of note payable on demand.

A note payable on demand is not to be considered as overdue, without some evidence of payment having been demanded and refused (*h*). Although it be several years old, and no interest has been paid on it. "A promissory note," says Mr. Baron Parke, "payable on demand, is intended to be a continuing security: it is quite unlike a check, which is intended to be presented speedily" (*i*).

(*e*) *Atwood* v. *Crowdie*, 1 Stark. 483

(*f*) *Down* v. *Halling*, 4 B. & C. 330; 6 D. & R. 445; 2 C. & P. 11, S. C.

(*g*) *Rothschild* v. *Corney*, 9 B. & C. 388; 4 M. & R. 411; Dans. & L. 325, S. C. See *Serrell* v. *Derbyshire Railway Company*, 9 C. B. 311, and the Chapter on CHECKS.

(*h*) *Barough* v. *White*, 4 B. & C. 327; 6 D. & R. 379; 2 C. & P. 8, S. C.; see *Goodall* v. *Ray*, 4 Dowl. 76.

(*i*) *Brooks* v. *Mitchell*, 9 M. & W. 15; *Cripps* v. *Davis*, 12 M. & W. 165; see *Bartrum* v. *Caddy*, 9 Ad. & E. 275. In America it has been held that such a note, unless transferred within a reasonable time after date, is to be considered as overdue; Byles on Bills, 5th American edition, p. 287.

CHAPTER XI.

Pleading.

The fact that a note is overdue must distinctly appear in pleading (*k*).

Equitable relief in case of an overdue bill.

Though the maker of a bill or note assigned when overdue may resist payment at law, equity has a concurrent jurisdiction, and may, when justice requires, order the instrument to be delivered up to be cancelled, and restrain the holder from proceeding at law (*l*).

Burthen of proof as to time of indorsement.

The law, in the absence of any evidence on the subject, presumes a transfer to have been made before the bill was due (*m*).

Transfer of a check drawn on the banker of the bearer.

Where a banker on whom a check is drawn, is also the banker of the bearer, and the check is paid in, there are two characters in which the banker may have received it: he may have received it merely as agent of the bearer, like any other securities which the bearer may have paid in on account; or he may have received it as drawee, and so by receiving it have paid it. *Primâ facie*, he must be taken to have received it as agent of the bearer (*n*), and will discharge himself by giving timely notice of nonpayment to the bearer (*o*); but if, while he keeps the check, the drawer pays in money, the banker is bound to appropriate that money to the payment of the check, though a larger balance is due to him from the drawer (*p*).

After abandonment of right by transferee.

Where a man, to whom a bill is transferred, sends it back as useless, that is an abandonment of his right as transferee, and he cannot, by getting the bill again into his hands, acquire a right to sue without a new transfer (*q*).

After payment by party ultimately liable.

After *payment*, at maturity, by the acceptor or maker, bills or notes are extinguished and cannot be transferred (*r*), except promissory notes payable to bearer on demand, re-

(*k*) *Cripps* v. *Davis*, 12 M. & W. 159.

(*l*) *Hodgson* v. *Murray*, 2 Sim. 515; —— v. *Adams*, Younge, 117.

(*m*) *Parkin* v. *Moon*, 7 C. & P. 408; *Lewis* v. *Lady Parker*, 4 Ad. & E. 838; 6 N. & M. 294; 2 Har. & W. 46, S. C.; *Cripps* v. *Davis*, 12 M. & W. 165. So also repeatedly held in America. See Byles on Bills, 5th American edition, p. 288.

(*n*) *Boyd* v. *Emerson*, 2 Ad. & E. 184; 4 N. & M. 99, S. C.

(*o*) Ibid.

(*p*) *Kilsby* v. *Williams*, 5 B. & Al. 815; 1 D. & R. 476, S. C.

(*q*) *Cartwright* v. *Williams*, 2 Stark. 340.

(*r*) 55 Geo. 3, c. 184, s. 19.

issued by the original maker, having taken out a licence for that purpose (*s*).

And an accommodation bill paid by the *drawer* at maturity cannot be re-issued by him (*t*).

And a note payable on demand, which has been paid, cannot be re-issued by the maker, although the indorsee have no notice that the note has ever been paid, or that payment has ever been demanded (*u*).

By other parties.

"But a bill of exchange," says Lord Ellenborough, "is negotiable, *ad infinitum*, until it has been paid by or discharged on behalf of the acceptor. If the drawer has paid the bill, it seems that he may sue the acceptor upon the bill; and if, instead of suing the acceptor, he put it into circulation on his own indorsement only, it does not prejudice any of the other parties who have indorsed the bill, that the holder should be at liberty to sue the acceptor" (*x*). The drawer of a bill payable *to his own order*, indorsed it over, and, on the bill being dishonoured, paid it to the holder, and afterwards indorsed it again. Held, that this last indorsee might recover against the acceptor (*y*). But, where the bill is drawn payable to a third person, is indorsed by him, dishonoured and taken up by the drawer, who (the payee's indorsement still remaining) indorsed it to the plaintiff, it was held, that the plaintiff could not recover against the acceptor; for in this case *the drawer had no title to indorse*, and the payee could not be rendered liable (*z*).

(*s*) Sections 14 and 24. Until a bill or note has been paid by the maker or acceptor, or on their behalf, it has not discharged its functions, and does not require a new stamp, though re-issued after due, and after it has been paid by an indorser. *Callow* v. *Lawrence*, 3 M. & Sel. 95.

(*t*) *Lazarus* v. *Cowie*, 3 Q. B. 464; *Parr* v. *Jewell*, 16 C. B. 684.

(*u*) *Bartrum* v. *Caddy*, 9 Ad. & E. 275; 1 Per. & D. 207, S. C.

(*x*) *Callow* v. *Lawrence*, 3 M. & Sel. 95; and see *Roberts* v. *Eden*, 1 B. & Pul. 398, and the observations of Patteson, J., on that case in *Bartrum* v. *Caddy*, 9 Ad. & E. 275; 1 Per. & D. 207, S. C. Where the indorser had paid the amount and the acceptor the costs, it was held that the vitality of the bill was not extinguished. *Woodward* v. *Pell*, 37 L. J., Q. B. 41; L. R., 4 Q. B. 55, S. C.

(*y*) Ibid.; *Hubbard* v. *Jackson*, 3 C. & P. 134; 4 Bing. 390; 1 M. & P. 11, S. C. In this last case, the holder had recovered at law against the drawer, and then the drawer, without consideration, indorsed the bill over to the plaintiff; but Best, C. J., held, and the Court of C. P. confirmed his judgment, that the plaintiff might recover.

(*z*) *Beck* v. *Robley*, 1 H. Bl. 89, n.

CHAPTER XI.

After premature payment.

If a bill or note be paid before it is due, and is afterwards indorsed over, it is a valid security in the hands of a *bonâ fide* indorsee. "I agree," says Lord Ellenborough, "that a bill paid at maturity cannot be re-issued, and that no action can afterwards be maintained upon it by a subsequent indorsee. A payment before it becomes due, however, I think, does not extinguish it any more than if it were merely discounted. A contrary doctrine would add a new clog to the circulation of bills and notes; for it would be impossible to know whether there had not been an anticipated payment of them. It is the duty of bankers to make some memorandum on bills and notes which have been paid, and if they do not, the holders of such securities cannot be affected by any payment made before they are due" (*a*).

After partial payment.

After a partial payment, at maturity, by the acceptor, or any other party really the principal debtor, the holder cannot recover of the acceptor more than the balance (*b*).

Where there is a doubt whether the bill were paid or transferred.

A question sometimes arises whether a bill have been paid or transferred. Though the holder give to a person taking up the bill a general receipt, importing that he has received payment, evidence is admissible to show that such person taking up the bill paid the money, not as agent for the acceptor or drawer, but as indorsee (*c*).

Transfer to acceptor.

A transfer to the acceptor before maturity does not extinguish the bill; the acceptor may re-issue it before it is due, and the parties whose names are on the bill will be liable to a subsequent holder (*d*).

Transfer for part of sum due.

A bill or note cannot be indorsed for part of the sum remaining due to the indorser upon it, if the limitation of the sum for which it is indorsed appear on the indorsement itself. Such an indorsement is not warranted by the custom of merchants, and would be attended with this inconvenience to the prior parties, that it would subject them to a plurality of actions (*e*). It is conceived, that the effect of

(*a*) *Burbidge* v. *Manners*, 3 Camp. 193; *Attenborough* v. *Mackenzie*, 25 L. J., Exch. 244.

(*b*) See the Chapter on PAYMENT.

(*c*) *Graves* v. *Key*, 3 B. & Ad. 313. See *Hubbard* v. *Jackson*, 4 Bing. 390; 1 M. & P. 11, S. C., and *Pollard* v. *Ogden*, 2 E. & B. 459.

(*d*) *Attenborough* v. *Mackenzie*, 25 L. J., Exch. 244. But see Byles on Bills, 5th American edition, p. 291.

(*e*) *Hawkins* v. *Cardy*, 1 Lord Raym. 360.

such an indorsement, when attempted, is to give the indorsee a lien on the bill, but not to transfer a right of action, except in the indorser's name (*f*).

But if a bill or note be indorsed or delivered for a part of the sum due on it, and the limitation of the transfer do not appear on the instrument, the transferee is entitled to sue the maker or acceptor for the whole amount of the bill, and is a trustee of the surplus for the transferer (*g*).

For residue unpaid.

If the bill have been partly paid, either by the acceptor or by the drawer, who for this purpose is the agent of the acceptor (*h*), the bill may be indorsed for the part remaining due (*i*).

After release.

A release at maturity, like a payment at maturity, operates as a complete extinction of the bill. But a premature release to a party liable on the bill, will not discharge the releasee as against an indorsee for value before maturity of the bill and without notice (*k*).

After action brought.

The holder cannot transfer after action brought, so as to enable his transferee to sue also, provided the latter were aware that the first action had been commenced (*l*). But if the transferee had no notice, the transfer is good (*m*).

Transfer in a foreign country

Where a negotiable instrument is transferred abroad, by a mode of transfer valid here, but invalid there, or *vice versâ*, a question may arise as to the validity to be attributed to such a transfer in our Courts. The general rule of law on this subject is, that a contract is to be governed by the law of the country where it is made or where it is to be per-

(*f*) So held in America. See Byles on Bills, 5th American edition, p. 291.

(*g*) *Reid* v. *Furnival*, 1 C. & M. 538; 5 C. & P. 499, S. C.

(*h*) *Bacon* v. *Searles*, 1 Hen. Bl. 88.

(*i*) *Hawkins* v. *Cardy*, 1 Lord Raym. 360; Carth. 466, S. C.; and see *Johnson* v. *Kennion*, 2 Wils. 262.

(*k*) *Dod* v. *Edwards*, 2 C. & P. 602.

(*l*) *Marsh* v. *Newell*, 1 Taunt. 109; *Jones* v. *Lane*, 2 Y. & C. 281. But it should seem from a recent decision in the Queen's Bench that this defence cannot be raised by plea, and that the defendant's course is to apply to the equitable jurisdiction of the court, although Mr. Baron Alderson, in *Jones* v. *Lane*, seems to have thought otherwise. *Deuters* v. *Townshend*, 33 L. J., Q. B. 301. In America it has been held that a judgment extinguishes the negotiable quality of a note; Byles on Bills, 5th American edition, p. 372.

(*m*) *Colombier* v. *Slim*, K. B., T. T., 12 Geo. 3; Chit. 9th ed. 217.

CHAPTER XI.

formed, but the remedy is to be moulded by the law of the country where it is sought (*n*). A bill is to be considered as made in the country where it is to be paid.

This subject, however, will be considered more in detail in the subsequent Chapter on FOREIGN BILLS and FOREIGN LAW (*o*).

After holder's death.

After the death of the holder his personal representatives should transfer (*p*). But where indorsement is necessary, and the testator has only written his name on the bill without delivery, the executor cannot complete the indorsement by mere delivery (*q*).

After his bankruptcy.

After the holder's bankruptcy his assignees should transfer, unless the bankrupt were merely agent or trustee. For the Bankrupt Laws have no operation on any property in the possession of the bankrupt, unless he have therein a beneficial interest (*r*).

After marriage.

The husband of a married woman, who acquires a right to a bill or note given to the wife, either before or during marriage, should indorse (*s*).

By deposit with a banker.

Bankers have a general lien on all securities for money which are deposited with them, as bankers, in the way of their business, and therefore on bills and notes payable to bearer, or on Exchequer bills, although the customer who deposited them was not the real owner, and had no authority to give a lien (*t*); but not on Exchequer bills delivered to them merely for the purpose of receiving the interest and exchanging them for new ones (*u*).

Transfer by way of pledge.

Where chattels are pledged as security for a debt payable *at a day prefixed*, the pledgee has at common law on default of his debtor, and after giving notice to redeem, a right to sell the pledge and reimburse himself (*x*).

(*n*) See the authorities collected in *Trimby* v. *Vignier*, 1 Bing. N. C. 151; 4 M. & S. 695; 6 C. & P. 25, S. C.

(*o*) Chapter XXXI.

(*p*) See ante, Chapter v., EXECUTORS, and as to the question whether one of several executors can indorse.

(*q*) *Bromage* v. *Lloyd*, 1 Exch. 32.

(*r*) See the Chapter on BANKRUPTCY.

(*s*) See Chapter v., MARRIED WOMEN.

(*t*) *Barnett* v. *Brandao*, 6 M. & G. 630.

(*u*) *Brandao* v. *Barnett*, 3 C. B. 519, Dom. Proc.

(*x*) *Tucker* v. *Wilson*, 1 P. Wms. 261; 1 Bro. P. C. 494, *S. C.* in error; *Pigott* v. *Cubley*, 15

This power of sale extends not only to a pledge of chattels, but to a pledge of stock or annuities (*y*).

The rule of the civil law is in substance the same. "Venduntur pignora simul atque solutionis dies venit, et debitor legitimo modo interpellatus, sine justâ causâ cessat" (*z*).

But a mere pledge of negotiable paper does not, it is conceived, confer a power of sale. For the pledgee is trustee of the rights and obligations of the holder. He cannot transfer his trust, but must preserve his remedies and collect payment from the parties liable at maturity. His transfer, though it may confer title, will not exonerate himself (*a*).

By will.

The words goods and chattels, or either of them, in a testamentary instrument, will pass all the personal estate of the testator, including choses in action, such as bills and notes. But, where the bequest is of all goods and chattels in a particular place, bills and notes in general do not pass. But it has been considered, that such notes as are commonly treated as money will pass (*b*).

Donatio mortis causâ.

It may not be useless to subjoin a few words as to the extent to which bills or notes may be the subjects of a *donatio mortis causâ* (*c*).

The law on this subject is entirely derived from the civil law. But the Digest and the commentators distinguish between several species of *donatio mortis causâ*, and in a manner very unsatisfactory (*d*). A *donatio mortis causâ* is thus defined in the Institutes: ***Mortis causâ donatio est, quæ propter mortis fit suspicionem, cum quis ita donat, ut si quid humanitus ei contigisset, haberet is qui accipit; sin autem supervixisset, is qui donavit reciperet, vel si eum donationis pœnituisset, aut prior decesserit is, cui donatum sit.*** * * * * * ***Et in summâ, mortis causâ donatio est, cum magis quis se velit habere, quam eum cui donat, magisque eum cui donat, quam heredem suum.*** But, as now understood in the law of England, a *donatio mortis causâ* is

C. B., N. S. 701; 2 Kent's Com. 805; *Martin* v. *Reed*, 31 L. J., C. P. 126.

(*y*) *Tucker* v. *Wilson*, ubi sup.; *Lockwood* v. *Ewer*, 2 Atkins, 303.

(*z*) Doctrina pandectarum, cap. 6, s. 318.

(*a*) See 2 Kent's Com. 802, 805; *Appleton* v. *Donaldson*, 3 Bur. 381; *Browne* v. *Ward*, 3 Duer. 360.

(*b*) *Stuart* v. *Bute*, 11 Ves. 662; S. C., in Dom. Proc., 1 Dow. 73; see 1 Roper on Leg. 224, 3rd ed.; 2 Wms. on Exors. 648 and 942, 3rd ed.

(*c*) See further on this subject the profound work of Mr. Justice Williams on Executors.

(*d*) See the judgment of Lord Hardwicke, in *Ward* v. *Turner*, 2 Ves. 431, and of Lord Roslyn, in *Tate* v. *Hilbert*, 2 Ves. jun. 111.

CHAPTER XI.

a conditional gift by the donor in contemplation of death (*e*) to take effect in the event of death (*f*). The result of the cases seem to be, that a bond (*g*) or a policy of insurance (*h*), or a bank note, or bill of exchange, or promissory note, specially indorsed to the donee or made or become payable to bearer, may be the subjects of a *donatio mortis causâ* (*i*), and that the delivery of a bond with mortgage deeds will impose a trust upon the real and personal representatives in favour of the donee (*k*). But a check drawn by the donor upon his own banker cannot be the subject of a *donatio mortis causâ*, because the death of the drawer is a revocation of the banker's authority to pay (*l*). No more, it is conceived, would be the gift of an I O U (*m*). And negotiable instruments, which are commonly treated as money for other purposes, may, like money, pass as *donationes mortis causâ* (*n*). The Courts lean against this sort of disposition. "Improvements in the law," says Lord Eldon, "or some things which have been considered improvements, have been lately proposed, and if, among those things called improvements, this *donatio mortis causâ* was struck out of our law altogether, it would be quite as well" (*o*). Yet it

(*e*) *Duffield* v. *Elwes*, 1 Bligh, N. S. 530; *Miller* v. *Miller*, 3 P. Wms. 356. See the opinion of Eyre, C. B., in *Blount* v. *Barrow*, 1 Ves jun. 546; but the qualification as to last illness is not found in the report of the case; 4 Bro. C. C. 72. See 1 Roper on Legacies, 3rd ed., and Williams on Executors, 3rd ed. 609.

(*f*) Delivery to an agent of the donee will be good, but not to a mere agent of the donor; *Farquharson* v. *Cave*, 2 Coll. 356; *Powell* v. *Hellicar*, 28 L. J., Chan. 355; 26 Beav. 261, S. C. A mere symbolical delivery will not suffice, *Ward* v. *Turner*, supra. There must be an actual delivery, *Bunn* v. *Martham*, 7 Taunt. 227; 2 Marshall, 532, S. C.; *Tate* v. *Hilbert*, 2 Ves. jun. 120; *Irons* v. *Smallpiece*, 2 B. & Al. 553.

(*g*) *Snellgrove* v. *Baily*, 3 Atk. 80.

(*h*) *Witt* v. *Amiss*, 30 L. J., Q. B. 318.

(*i*) *Drury* v. *Smith*, 1 P. Wms. 405; *Miller* v. *Miller*, 3 P. Wms. 356.

(*k*) *Duffield* v. *Elwes*, 1 Bligh, 409.

(*l*) Unless cashed, or it seems presented for payment, in the lifetime of the donor. *Bromley* v. *Brunton*, L. R., 5 Eq. 275; *Bouts* v. *Ellis*, 17 Beav. 121; 4 De G., M. & G. 249; *Powell* v. *Hellicar*, 28 L. J., Chan. 355; 26 Beav 261, S. C.; *Hewitt* v. *Kaze*, L. R., 5 Eq. 198; Byles on Bills, 5th American edition, p. 101.

(*m*) *Tate* v. *Hilbert*, 2 Ves. jun. 111; 4 Bro. C. C. 286. For a check imports immediate payment; but a check to buy mourning has been held to be the subject of a *donatio mortis causâ*. *Lawson* v. *Lawson*, 1 P. Wms. 441: but see 2 Ves. jun. 121; see also as to checks, *Bouts* v. *Ellis*, 4 De G., M. & G. 249.

(*n*) See *Ranklin* v. *Wegueliu*, 27 Beav. 309; 29 L. J., Chan. 323, S. C.; *Veal* v. *Veal*, 27 Beav. 303; 29 L. J., Chan. 321, S. C.

(*o*) *Duffield* v. *Elwes*, 1 Bligh, 633, A. D. 1827; 7 Taunt. 221, S. C.

has since been twice held that a promissory note payable to order and not indorsed may pass as a *donatio mortis causâ* (*p*).

A *donatio mortis causâ* may be made subject to a condition or trust (*q*).

How it resembles a legacy.

A *donatio mortis causâ* resembles a legacy in these respects, that it is revocable during the life of the donor, that it is subject to debts on a deficiency of assets (*r*), that it is liable to legacy duty (*s*), and that it may be made to the donor's wife.

How it differs from a legacy.

It differs from a legacy in these other respects; that it does not require probate, and that although it be of a specific chattel, yet the executors' assent is not necessary (*t*).

A *donatio mortis causâ* differs from a gift *inter vivos* in these respects. It is revocable. It may be made to a man's wife; and it may be of a bond or mortgage deed, though neither the debt would have passed at law, nor equity have converted the donor into a trustee.

The Wills Act, 1 Vict. c. 26, has not abolished *donationes mortis causâ* (*u*).

Execution.

Bills or notes could not at common law be taken in execution, at the suit of a subject; nor, if taken, could the sheriff or his assignee acquire a title against the other parties to the instrument, they being only assignable by the custom of merchants, in the way of ordinary mercantile transfer. And such as more nearly resemble money than securities, as bank notes, were, like money, not subject to be taken in execution (*x*).

But now by the 1 & 2 Vict. c. 110, s. 12, money, bank notes, checks, bills, and promissory notes, with all other securities for money, may be seized under a writ of *fieri facias*. The sheriff is to deliver the money and bank notes to the execution creditor, and is to receive payment, or to sue in his own name, being indemnified by the plaintiff, on the checks, bills, or notes.

(*p*) *Veal* v. *Veal*, 29 L. J. Chan. 321; 27 Beav. 303, S. C.; *Ranklin* v. *Weguelin*, supra.

(*q*) *Blount* v. *Burrow*, 4 Bro., C. C. 72; *Hills* v. *Hills*, 10 L. J., Exch. 440; 8 M. & W. 401, S. C.

(*r*) *Smith* v. *Caren*, 1 P. Wms. 406.

(*s*) 8 & 9 Vict. c. 76.

(*t*) *Thompson* v. *Hodgson*, 2 Stra. 777.

(*u*) *Moore* v. *Darton*, 4 De G. & Smale, 519.

(*x*) *Francis* v. *Nash*, Rep. temp. Hardwicke, 53; *Knight* v. *Criddle*, 9 East, 48; *Fieldhouse* v. *Croft*, 4 East, 510.

CHAPTER XI.

But if the creditor, before receiving payment, proceeds against the person of the defendant, he forfeits the benefit of the security (*y*).

Bills and notes are liable to be seized under an extent (*z*).

Larceny.

Bills or notes are not the subjects of larceny at the common law; for it is said, that bills or notes are choses in action, and a chose in action cannot be stolen (*a*). But, by the 24 & 25 Vict. c. 96, s. 27, the stealing of any bill, note, warrant, or order for the payment of money, is made felony, of the same nature, and in the same degree, and punishable in the same manner, as larceny of any chattel of like value with the money due on the security.

Embezzlement.

The embezzlement of bills or notes by clerks or servants is felony (*b*).

The embezzlement of bills or notes by agents, not being clerks or servants, or the selling, negotiating, or pledging them, in violation of the purpose for which, by a written direction, they were intrusted, and the disposing of them for the agent's own benefit, is a misdemeanor subjecting to penal servitude (*c*).

Effect of a transfer in removing technical difficulties in suing.

Where a man is both entitled and liable on the face of a bill, or liable to contribute, though his liability do not appear on the face of the instrument, he cannot sue. But the technical difficulty may be removed by indorsement or transfer (*d*), before the bill is due.

(*y*) Sect. 16.

(*z*) West, 27, 28; 164-5.

(*a*) As a general rule a piece of paper or parchment, whether blank or inscribed with any characters, is the subject of larceny. But there are at common law two exceptions, first, a muniment of title to land, which, it is held, savours of the realty. Secondly, a written paper, which is mere evidence of a right, resting in contract only, like a bill, note, bond, or executory agreement. A reason given in both these cases is this, that the documents are of no use to any but the owner, and therefore are not in danger of being stolen. On which it has been well remarked, that "if I steal a skin of parchment worth 1*s.* it is felony, but when it has £10,000 added to its value by what is written upon it, then it is no offence to take it away." *Rex* v. *Westbeer*, 2 Stra. 1133. These exceptions are palpably capricious and unreasonable, and are not to be extended. Therefore, it has been held, that a pawnbroker's ticket may be the subject of larceny. *Reg.* v. *Morrison*, 28 L. J., 210, Mag. Ca.

(*b*) 24 & 25 Vict. c. 96, s. 68.

(*c*) 24 & 25 Vict. c. 96, s. 75.

(*d*) See *Steele* v. *Harmer*, 15 L. J., Exch. 217; 14 M. & W. 831, S. C., and 4 Exch. 1, in error, and ante.

Eighthly, as to the circumstances under which equity will restrain negotiation. A Court of Equity will interpose to restrain the negotiation of a bill unduly obtained; for the defence at law may not be available as against an innocent indorsee for value, or time may destroy the evidence (*e*); and will, on equitable terms, decree a bill void in its creation, or unduly obtained, to be delivered up to be cancelled (*f*).

(*e*) *Bromley* v. *Holland*, 7 Ves. 20, 413; *Bishop of Winchester* v. *Fournier*, 2 Ves. jun. 483; 3 Ves. 757; 9 Ves. 355. As to the parties to the suit, see *Tyley* v. *Carlon*, 1 Younge, 373. But the Court will not order a bill to be delivered up unless the plaintiff has a right to the possession, and the defendant's detention of the bill is inequitable. *Jones* v. *Lane*, 3 Y. & C. 281. In *Threlfall* v. *Lunt*, 7 Sim. 627, a demurrer was allowed to a bill for the delivery up of a bill of exchange, the amount of which the defendant had recovered at law, and had received from the plaintiff; but see *Pinkus* v. *Peters*, 6 Jurist, 431.

(*f*) 2 Ves. jun. 488; 7 Ves. 413; 2 Ves. & Beam. 302; *Mackworth* v. *Marshall*, 3 Sim. 368. *Osbaldiston* v. *Simpson*, 13 Sim. 513. So where the name of the payee, as indorser, was forged, a *bonâ fide* holder was restrained from suing the acceptor, and the Court directed the bill to be delivered up to be cancelled. *Esdaile* v. *La Nauze*, 1 Y. & C. 394; *Jones* v. *Lane*, 3 Y. & C. 281.

CHAPTER XII.

OF THE PRESENTMENT FOR ACCEPTANCE.

Advisable in all Cases . 180
Necessary where Bill is drawn at or after Sight . 180
When to be made . . 180
At what Hour . . . 182
Excused by putting Bill into Circulation . . 182
Or by other reasonable Cause 182
To whom it should be made 183
What Time may be given to the Drawee . . . 183
Consequence of Negligence in Party presenting . 183
Proper Course for Holder when Drawee cannot be found, or is dead . . 183
PLEADING . . . 183

CHAPTER XII.

Advisable in all cases.

IT is in all cases advisable for the holder of an unaccepted bill to present it for acceptance without delay; for, in case of acceptance, the holder obtains the additional security of the acceptor, and, if acceptance be refused, the antecedent parties become liable immediately. It is advisable, too, on account of the drawer, for, by receiving early advice of dishonour, he may be better able to get his effects out of the drawee's hands.

But presentment for acceptance is not necessary in the case of a bill payable at a certain period after date. It is said, however, that it is incumbent on a holder who is a mere agent, and on the payee, when expressly directed by the drawer so to do, to present the bill for acceptance as soon as possible; and that, for loss arising from the neglect, the payee must be responsible, and the agent must answer to his principal (*a*).

Necessary where bill is drawn payable ~~at or~~ after sight.

Presentment for acceptance is necessary, if the bill be drawn payable ~~at sight, or at~~ a certain period after sight. Till such presentment there is no right of action against any party: and unless it be made within a reasonable time (*b*), the holder loses his remedy against the antecedent parties.

When to be made.

What is a reasonable time depends on the circumstances of each particular case, and is a mixed question of law and

(*a*) Chit. 9th ed. 237; Poth. 128; Marius, 46.

(*b*) So also held in America; Byles on Bills, 5th American edition, 300.

× note a Bill payable at sight is now payable on demand (34 & 35 Vict. 74)

fact (*c*); although reasonable time in general, and reasonable time for giving notice of dishonour in particular, is clearly a question of law. Plaintiff, on Friday, the 9th, at Windsor, twenty miles from London, received a bill on London, at one month after sight, for 100*l*. There was no post on Saturday. It was presented on the Tuesday. The jury thought it was presented within a reasonable time, and the Court concurred (*d*).

A bill drawn by bankers in the country on their correspondents in London, payable after sight, was indorsed to the traveller of the plaintiffs. He transmitted it to the plaintiffs after the interval of a week, and they, two days afterwards, transmitted it for acceptance. Before it was presented to the drawees, the drawer had become bankrupt; the drawees, consequently, refused to accept. Had the bill been sent by the traveller to the plaintiffs, his employers, as soon as he received it, they would have been able to get it accepted before the bankruptcy. "This is," says Lord Tenterden, "a mixed question of law and fact; and, in expressing my own opinion, I do not wish at all to withdraw the case from the jury. Whatever strictness may be required with respect to common bills of exchange, payable after sight, it does not seem unreasonable to treat bills of this nature, drawn by bankers on their correspondents, as not requiring immédiate presentment, but as being retainable by the holders for the purpose of using them, within a moderate time (for indefinite delay, of course, cannot be allowed), as part of the circulating medium of the country." The jury concurred with his Lordship, that the delay was not unreasonable (*e*). Where the purchaser of a bill on Rio Janeiro, at sixty days' sight, the exchange being against him, kept it nearly five months, and the drawee failed before presentment, it was held, that the delay was not unreasonable. "The bill," says Tindal, C. J., "must be forwarded within a reasonable time under all the circumstances of the case, and there must be no unreasonable or improper delay. Whether there has been, in any particular case, reasonable diligence used, or whether unreasonable delay has occurred, is a mixed question of law and fact, to be decided by the jury, acting under the direction of the Judge, upon the particular circumstances of each case" (*f*).

(*c*) *Muilman* v. *D'Eguino*, 2 H. Bl. 565; *Fry* v. *Hill*, 7 Taunt. 395; *Shute* v. *Robins*, 1 M. & M. 133; 3 C. & P. 80, S. C.; *Mellish* v. *Rawdon*, 9 Bing. 416; 2 M. & Sc. 570, S. C.; *Mullick* v. *Radakissen*, 9 Moore, P. C. Cases, 46.

(*d*) *Fry* v. *Hill*, 7 Taunt. 395.

(*e*) *Shute* v. *Robins*, 1 M. & M. 133; 3 C. & P. 80, S. C.

(*f*) *Mellish* v. *Rawdon*, 9 Bing. 416; 2 M. & Sc. 570, S. C.

CHAPTER XII.

But where a bill, payable after sight, was drawn in duplicate on the 12th of August, in Newfoundland, and not presented for acceptance in London till November 16, and no circumstances were proved to excuse the delay, it was held unreasonable (*g*), the Court laying some stress on the fact that the bill was drawn in sets.

At what hour.

Presentment should be made during the usual hours of business (*h*).

Excused by putting bill into circulation.

The holder may, however, put the bill into circulation without presenting it. "If a bill drawn at three days' sight," says Mr. Justice Buller, "be kept out in circulation for a year, I cannot say that there would be *laches;* but if, instead of putting it into circulation, the holder were to lock it up for any length of time, I should say that he would be guilty of *laches*" (*i*). "But this cannot mean," says Tindal, C. J., "that keeping it in hand for any time, however short, would make him guilty of *laches*. It can never be required of him instantly on receipt of it, under all disadvantages, to put it into circulation. To hold the purchaser bound by such an obligation would impede, if not altogether destroy, the market for buying and selling *foreign bills*, to the great injury, no less than to the inconvenience, of the drawer himself" (*k*). Two bills, one for 400*l*., the other for 500*l*., were drawn from Lisbon, on May 12, at thirty days after sight, indorsed to G. at Paris, and by G. to R. at Genoa, and by R. indorsed over. They were not presented for acceptance till 22nd August. The jury found, and the Court concurred, that the bills were, under the circumstances, presented within a reasonable time (*l*).

By other reasonable cause.

Illness or other reasonable cause not attributable to the misconduct of the holder will excuse. But the holder must present, even should the drawer have desired the drawee not to accept (*m*), though, as we shall see, the drawer in that case need have no notice of non-acceptance.

(*g*) *Straker* v. *Graham*, 4 M. & W. 721.

(*h*) Mar. 112; *Parker* v. *Gordon*, 7 East, 385; 6 Esp. 41, S. C.; *Leftley* v. *Bailey*, 4 T. R. 170. In America it is held that business hours (except in the case of bankers) range through the whole day, down to the hours of rest in the evening. See Byles on Bills, 5th American edition, p. 301.

(*i*) *Muilman* v. *D'Eguino*, 2 H. Bl. 565.

(*k*) *Mellish* v. *Rawdon*, 9 Bing. 416; 2 M. & Sc. 570, S. C.

(*l*) *Goupy* v. *Arden*, 7 Taunt. 160; 2 Marsh, 454, S. C. In America it is held, that though put into circulation it must still be presented within a reasonable time. Byles on Bills, 5th American edition, p. 302.

(*m*) *Hill* v. *Heap*, D. & R., N. P. C. 57.

CHAPTER XII.

The presentment must be made either to the drawee himself, or to his authorized agent. The holder's servant called at the drawee's residence, and showed the bill to some person in the drawee's tan-yard, who refused to accept it; but the witness did not know the drawee's person, nor could he swear that the person to whom he offered the bill was he, or represented himself to be so. Lord Ellenborough: "The evidence here offered proves no demand on the drawee, and is, therefore, insufficient" (*n*).

To whom it should be made.

When the bill is presented, it is reasonable that the drawee should be allowed some time to deliberate whether he will accept or no. It seems that he may demand twenty-four hours for this purpose (and that the holder will be justified in leaving the bill with him for that period); at least, if the post do not go out in the interim (*o*), or unless, in the interim, he either accepts or declares his resolution not to accept (*p*). If more than twenty-four hours be given, the holder ought to inform the antecedent parties of it (*q*).

What time for deliberation may be given to drawee.

If the owner of a bill who leaves it for acceptance, by his negligence, enable a stranger to give such a description of it as to obtain it from the drawee, without negligence on the drawee's part, the owner cannot maintain trover for it against the drawee (*r*).

Consequence of negligence in party presenting.

In case the bill is directed to the drawee at a particular place, it is to be considered as dishonoured if the drawee has absconded (*s*). But, if he have merely changed his residence, or if the bill is not directed to him at any particular place, it is incumbent on the holder to use due diligence to find him out. And due diligence is a question of fact for the jury (*t*). If the drawee be dead, the holder should inquire after his personal representative, and, provided he live within a reasonable distance, present the bill to him (*u*).

Course for holder when drawee cannot be found or is dead.

PLEADING.

In an action against the drawer for non-acceptance, it is not sufficient to allege mere non-acceptance; presentment for acceptance must be alleged (*x*).

(*n*) *Cheek* v. *Roper*, 5 Esp. 175.
(*o*) Marius, 15; Com. Dig. Merch. F. 6; *Bellasis* v. *Hester*, 1 Ld. Raym. 281. *Vandland*
(*p*) Bayley, 194, 6th ed.
(*q*) *Ingram* v. *Foster*, 2 Smith, 242.
(*r*) *Morrison* v. *Buchanan*, 6 C. & P. 18.
(*s*) Anon., 1 Ld. Raym. 743.
(*t*) *Collins* v. *Butler*, 2 Stra. 1087; *Bateman* v. *Joseph*, 12 East, 433.
(*u*) Chitty, 9th ed. 357.
(*x*) *Mercer* v. *Southwell*, 2 Show. 180.

CHAPTER XIII.

OF ACCEPTANCE.

Meaning of the Word . 184
Liability of Drawee before Acceptance . . . 184
A Draft dispensing with Acceptance . . . 185
Liability of a Banker at whose Bank a Bill is made payable by the Acceptor 185
Liability to the Customer . 185
Liability of the Banker to a Holder . . . 185
By whom it may be given . 186
Not by a Series of Acceptors 186
WHEN 187
Before Bill filled up . . 187
Not before Bill in existence 188
After due, or after prior refusal to accept . . 189
Presumption as to Time of Acceptance . . . 189
Acceptance of Inland Bills must be in Writing on the Bill 189
What will amount to an Acceptance in Writing on the Bill 189
What will amount to an Acceptance of Foreign Bill 190
A Promise to pay . . 190
To whom it may be made . 190
Is irrevocable . . . 191
What else amounts to Acceptance of a Foreign Bill 191
What engagement Holder may require of Acceptor . 192
What should be his conduct in case of qualified Acceptance . . . 192
Qualified Acceptance . 193
Conditional Acceptance . 193
Partial or varying Acceptance 194
Payable at particular Place 194
Presentment for Payment there 195
Effect of two Acceptances on the same Bill . . 195
Delivery or Notice necessary to complete Acceptance 195
Cancellation of Acceptance by Drawee . . . 195
By Banker . . . 196
By other Parties . . 196
Liability of Acceptor . 196
How discharged . . 196
By Waiver . . . 196
Cancellation by the Holder 198
Security by Specialty . 198
Pleading 199
What Acceptance admits . 199
Where Drawee precluded from disputing Acceptance 200

Obligation to accept 200

CHAPTER XIII.

Meaning of the word.

ACCEPTANCE, in its ordinary signification, is an engagement by the drawee to pay the bill when due (*a*), in money (*b*).

Liability of drawee before acceptance.

Before acceptance the drawee is not liable to the holder (*c*).

(*a*) *Clark* v. *Cock*, 4 East, 72.
(*b*) *Russell* v. *Phillips*, 19 L. J., Q. B. 297; 14 Q. B. 891, S. C.
(*c*) See *Frith* v. *Forbes*, 31 L. J., Chanc. 793; 32 L. J., Chanc. 10, S. C.

An instrument drawn by A. upon B., requiring him to pay to the order of C. a certain sum at a certain time "without acceptance," is still a bill of exchange, and may be so described in an indictment for forgery (*d*).

A draft dispensing with acceptance.

A bill is often by the acceptor made payable at a banker's. By such a direction on a bill the banker incurs liabilities to his customer, and may incur a liability to the holder.

Liability of a banker at whose bank a bill is made payable by the acceptor.

We have already seen that, without acceptance, a banker may be liable to his customer, if, having sufficient funds, he neglect to pay his checks. So a banker, at whose house a customer accepting a bill makes it payable, is liable to an action at the suit of that customer, if he refuse to pay it, having at the time of presentment funds sufficient, and having had those funds a reasonable time, so that his clerks and servants might know it (*e*).

Liability to the customer.

Yet if he do pay a holder whose title depends on a forged indorsement, he cannot charge his customer with the payment (*f*). But it has been said by the Court of Exchequer Chamber, that he is protected if he pay any one who can give a valid discharge (*g*). Yet, notwithstanding this, it may well be doubted whether, in the case of a bill made or become payable to bearer, he is in as good a situation as an ordinary transferee, whose title is not affected by mere negligence. For the banker, as agent for the customer, undertakes to conduct himself with reasonable care. An honest but negligent payment, which may entitle the banker to the bill as against the true owner, may be insufficient to enable him to charge his customer.

Where a bill is accepted payable at a banker's, though money had been remitted by the acceptor to the banker for the express purpose of paying the bill, the banker is not liable to the holder in an action for money had and received, unless he have assented to hold the money for the purpose for which it was remitted (*h*). But where there is anything in the conduct or situation of the banker which amounts to

Liability to a holder.

(*d*) *Miller* v. *Thomson*, 3 M. & G. 576; *Reg.* v. *Kinnear*, 2 M. & Rob. 117.

(*e*) See *Whitaker* v. *The Bank of England*, 6 C. & P. 700, and 1 C., M. & R. 744; 1 Gale, 54, S. C.; *Rolin* v. *Steward*, 14 C. B. 595; *Robarts* v. *Tucker*, 16 Q. B. 560.

(*f*) *Robarts* v. *Tucker*, 16 Q. B. 560.

(*g*) Ibid.

(*h*) *Williams* v. *Ererett*, 14 East, 582; *Yates* v. *Bell*, 3 B. & Ald. 643; *Wedlake* v. *Hurley*, 1 C. & J. 83.

CHAPTER XIII.

an assent to hold the remittance upon trust to discharge the bill, he is liable to the holder (*i*).

By whom it may be accepted.

A bill can only be accepted by the drawee (*k*), and not by a stranger, except for honour (*l*). Where, indeed, the bill was not addressed to any one, but only indicated the place of payment, the acceptor was held liable as having admitted himself to be the party pointed out by the place of payment (*m*). But this decision goes to the very verge of the law (*n*).

If the drawee be incompetent to contract, as, for example, by reason of infancy or coverture (*o*), the bill may be treated as dishonoured.

We have already seen (*p*) that one partner may, by his acceptance, bind his co-partners. But, if a bill be drawn upon several persons not in partnership, it should be accepted by all, and, if not, may be treated as dishonoured (*q*). Acceptance will, however, be binding upon such of them as do accept (*r*).

Not by a series of acceptors.

There cannot be two or more separate acceptors of the same bill not jointly responsible. A. refused to supply B. with goods, unless C. would become his surety. C. agreed to do it. Goods to the value of 157*l.* were accordingly sold by A. to B. For the amount A. drew on B., and the bill was accepted both by B. and C., each writing his name on it. Lord Ellenborough: "If you had declared that, in consequence of A. selling the goods to B., C. undertook that the bill should be paid, you might have fixed C. by this evidence. But I know of no custom or usage of merchants according to which, if a bill be drawn upon one man, it may be accepted by two; the acceptance of the defendant is contrary to the usage and custom of merchants. A bill must be accepted by the drawee, or, failing him, by some one for

(*i*) *De Bernales* v. *Fuller*, 14 East, 590, n.; 2 Camp. 426; and see the observations of Abbott, C. J., on this case, in *Yates* v. *Bell*, 3 B. & Ald. 643.

(*k*) *Nichols* v. *Diamond*, 9 Exch. 157. Unless he have recognized the acceptance as his. See *Lindus* v. *Bradwell*, 5 C. B. 583.

(*l*) *Polhill* v. *Walter*, 3 B. & Ad. 114; 1 L. J., K. B. 92; *Eastwood* v. *Bain*, 28 L. J., Ex. 74; 3 H. & N. 738, S. C.; *Davis* v. *Clarke*, 13 L. J., Q. B. 305; 6 Q. B. 16, S. C.; see *Jenkins* v. *Hutchinson*, 18 L. J., Q. B. 274; 13 Q. B. 744, S. C.

(*m*) *Gray* v. *Milner*, 8 Taunt. 739.

(*n*) See the observations of Patteson, J., in *Davis* v. *Clarke*, supra, and of Martin, B., in *Peto* v. *Reynolds*, 9 Exch. 410.

(*o*) Chit. 9th ed. 283.

(*p*) Chapter II.

(*q*) Mar. 16; *Dupays* v. *Shepherd*, Holt's R. 297; Marius, 64.

(*r*) B. N. P. 270; Bayley, 58; *Owen* v. *Von Uster*, 10 C. B. 318; *Nichols* v. *Diamond*, 9 Exch. 154.

the honour of the drawer. There cannot be a series of acceptors. The defendant's undertaking is clearly collateral, and ought to have been declared upon as such" (*s*). But, although there can be no other acceptor after a general acceptance of the drawee, it is said that, when a bill has been accepted *supra protest*, for the honour of one party, it may, by another individual, be accepted *supra protest*, for the honour of another (*t*). We shall, hereafter, consider the subject of acceptance *supra protest* in a distinct Chapter. A bill may, as we have seen (*u*), be addressed to the drawer himself and accepted by him; but it is then rather a promissory note than a bill of exchange.

WHEN.

Before bill filled up.

We have already seen that the signature of a drawer, maker, or indorser, on a blank form, delivered to be filled up as a negotiable instrument, will bind them respectively; so an acceptance, written on the paper before the bill is made, and delivered by the acceptor, will also charge the acceptor to the extent warranted by the stamp (*x*). It is not even necessary that the bill should be drawn by the same person to whom the acceptor handed the blank acceptance (*y*). And where a blank acceptance was filled up after the lapse of twelve years, and, as the jury found, after the lapse of a reasonable time, the acceptor was held liable to a *bonâ fide* indorsee (*z*). But it is conceived that the case of a blank acceptance not delivered at all, but lost or stolen, at least without any negligence of the writer, is distinguishable (*a*).

(*s*) *Jackson* v. *Hudson*, 2 Camp. 447.

(*t*) *Jackson* v. *Hudson*, 2 Camp. 447, n.; Beawes, 42.

(*u*) Chapter VII.

(*x*) Though the bill be antedated, *Armfield* v. *Armport*, 27 L. J., Exch. 42; and in America, where there is no stamp, the amount for which the blank may be filled up is unlimited. Byles on Bills, 5th American edition, p. 307.

(*y*) *Schultz* v. *Astley*, 2 Bing. N. C. 544; 2 Scott, 815; 1 Hodges, 525; 7 C. & P. 99, S. C. The acceptor is estopped as against a transferee for value to deny the regularity of the acceptance. In America it is held, that if the blank paper come into the hands of a holder without notice, he may fill up the blank with a larger sum than the original holder was authorized to insert. See Byles on Bills, 5th American edition, p. 308.

(*z*) *Montague* v. *Perkins*, 22 L. J., C. P. 188.

(*a*) See the question put by Cresswell, J., to counsel in *Montague* v. *Perkins*, 22 L. J., C. P. 189, to which the answer of counsel does not appear satisfactory. See, however, the observations of the Court of C. P. in *Ingham* v. *Primrose*, 28 L. J., C. P. 295; 7 C. B., N. S. 82, S. C. Perhaps the obligation created by blank makings, acceptances and indorsements of bills, checks or notes depends on the principle of estoppel, and not on any peculiarity of negotiable paper. On

CHAPTER XIII.

An acceptance for value, before the bill is filled up, is irrevocable. Notice that the acceptance was in blank should put the holder on inquiry (*b*).

Not before the bill is in existence.

It was formerly held (in cases where an acceptance in writing on the bill was not necessary), that a promise to accept, given *before the bill was made*, amounted to an acceptance. Thus, a promise by the defendants, that they would accept such bills as the plaintiff should, in about a month's time, draw on the defendant for 800*l*., has been held an acceptance of such bill subsequently drawn (*c*). But it was said that a subsequent holder could not avail himself of such an engagement, unless it was communicated to him at the time he took the bill. "A promise to accept," says Gibbs, C. J., "not communicated to the person who takes the bill, does not amount to an acceptance; but, if the person be thereby induced to take a bill, he gains a right equivalent to an actual acceptance, against the party who has given the promise to accept" (*d*). But it is now settled that there cannot be an oral acceptance of a non-existing bill (*e*), although the bill be discounted by the drawer on the faith of a promise to accept (*f*). It has been decided, since 1 & 2 Geo. 4, c. 78, that an acceptance may be written before the bill is drawn, though that statute makes it essential to the acceptance of an inland bill, that it should be in writing *on such bill;* and it will be no variance, though the declaration state the drawing to have been first and the acceptance afterwards (*g*).

this ground it is put by Lord Mansfield in *Russell* v. *Lanstaffe*, and by Lord Chief Justice Tindal in *Schultz* v. *Astley*, ubi supra; but see the observations of Williams, J., in *Ex parte Swann*, 7 C. B. 447, and Martin, B., and Channell, B., in *Swan* v. *North British Australian Company*, 31 L. J., Exch. 435. On the question whether the principle of estoppel can be applied to a *deed* improperly filled up, the Courts of Common Pleas and of Exchequer were equally divided. Ibid. In the Exchequer Chamber it was held that it could not. 32 L. J., Exch. 273.

(*b*) *Hatch* v. *Searles*, 2 Sm. & G. 147; 24 L. J., Ch. 22, S. C.

(*c*) *Pillans* v. *Van Mierop*, 3 Burr. 1663; *Pierson* v. *Dunlop*, Cowp. 571; *Mason* v. *Hunt*, Doug. 284, 287.

(*d*) *Milne* v. *Prest*, 4 Camp. 393; Holt, N. P. 181, S. C., evidently an inaccurate report in Holt, see 11 M. & W. 390; *Johnson* v. *Collings*, 1 East, 98.

(*e*) *Johnson* v. *Collings*, 1 East, 98; *Bank of Ireland* v. *Archer*, 11 M. & W. 383. But in general this is otherwise in America. Byles on Bills, 5th American edition, p. 309, *et seq.*

(*f*) Ibid.

(*g*) *Molloy* v. *Delves*, 7 Bing. 428; 5 M. & P. 275; 4 C. & P. 492, S. C. And it is probable the same interpretation will be put on the present act 19 & 20 Vict. c. 97, which requires the signature of the acceptor.

A bill may be accepted after the period at which it is made payable has elapsed, and the acceptor will then be liable to pay on demand; yet, if the declaration state the acceptance to be *according to its tenor and effect*, those words will be but surplusage (*h*). It may also be accepted after a previous refusal to accept (*i*).

After due, or after prior refusal to accept.

It sometimes becomes material to inquire at what time the bill was accepted. The presumption is that it was accepted before maturity and within a reasonable time of its date (*k*).

Presumption as to time of acceptance.

The statute 3 & 4 Anne, c. 9, s. 5, expressly enacts, that no acceptance of any inland bill of exchange shall be sufficient to charge any person whatever, unless it be underwritten, or indorsed in writing on the bill. This statute, however, seems to be very loosely and obscurely drawn. Two Chief Justices accordingly held, on considering the whole of the act, that a verbal acceptance was binding, notwithstanding these words; which decision was finally settled to be law by Lord Hardwicke (*l*). It had often been lamented by the Judges, that anything short of a writing on the bill should have been considered as an acceptance; and at length, in accordance with the opinions of the Bench, and, perhaps, of the Legislature, in framing the last-mentioned act, the 1 & 2 Geo. 4, c. 78, s. 2, enacted, that no acceptance of any *inland* (*m*) bill of exchange shall be sufficient to charge any person, unless such acceptance be in writing on such bill, or, if there be more than one part of such bill, on one of the said parts. This statute, however, does not apply to foreign bills, and does not require the acceptance to be signed. Finally, the 19 & 20 Vict. c. 97, s. 6, enacts, that no acceptance of a bill, *inland or foreign*, made after the year 1856, shall charge any person, unless in writing on the bill, and *signed* by the acceptor, or some person duly authorized by him.

Acceptance of bill must now be in writing on the bill, and signed.

The usual mode of making such an acceptance on the bill was, even before the last-mentioned statute, by writing the

What will amount to an acceptance in writing on the bill.

(*h*) *Jackson* v. *Pigott*, 1 Ld. Raym. 364; *Mutford* v. *Walcot*, 1 Ld. Raym. 574; 1 Salk. 129, S. C.; *Stein* v. *Yglesias*, 5 Tyr. 172; 1 C., M. & R. 565; 1 Gale, 98, S. C.

(*i*) *Wynne* v. *Raikes*, 5 East, 514; 2 Smith, 89, S. C.

(*k*) *Roberts* v. *Bethell*, 12 C. B. 778.

(*l*) *Lumley* v. *Palmer*, 2 Str. 1000; Rep. temp. Hardwicke, 74, S. C.

(*m*) As to what is an inland and what a foreign bill, see the Chapter on FOREIGN BILLS.

CHAPTER XIII.

word "*accepted*," and subscribing the drawee's name. Signature was not essential to a written acceptance within the statute 1 & 2 Geo. 4, c. 78, but it was a question for the jury, whether the acceptance was complete (*n*). If the bill be payable after sight, the day when accepted should also be expressed. But the drawee's name alone, written on any part of the bill, was a sufficient acceptance; so, without any name, the word "accepted," "presented," "seen," the day of the month, or a direction to a third person to pay it (*o*). Where one banker held a check drawn on another banker, presented it after four o'clock, and it was not paid, but, according to the practice of the London bankers, a mark was put on it, to show the drawer had effects, and that it would be paid; this marking was held to amount to an acceptance payable next day at the clearing-house (*p*). It is not necessary, in pleading the acceptance of an inland bill, to aver that the acceptance was in writing, or signed (*q*).

What will amount to acceptance of a foreign bill.

It will be observed, that the 1 & 2 Geo. 4, c. 78, so far as it relates to acceptances in writing, does not extend to foreign bills, and the late statute, 19 & 20 Vict. c. 97, s. 6, extends only to foreign bills after the year 1856, and probably not to foreign bills accepted abroad, where, by the law of the place, a written acceptance may not be necessary. It is proper, therefore, to consider the state of the law previously to the late enactments in respect of acceptances not on the bill, as the former law may still apply to acceptances of many bills drawn or accepted abroad.

A promise to pay.

We have already seen (*r*), that a promise to accept a bill, not drawn, will not be available as an acceptance; but a promise, written or oral, to pay or accept an existing foreign bill, is, at common law, of itself an acceptance (*s*).

To whom it may be made.

And such an acceptance might be given to the drawer, or any other party to the bill, after it had been indorsed away,

(*n*) *Dufaur* v. *Oxenden*, 1 M. & R. 90.

(*o*) Anon., Comb. 401; *Powell* v. *Monnier*, 1 Atk. 611; *Moor* v. *Withy*, B. N. P. 270; *Dufaur* v. *Oxenden*, 1 M. & R. 90.

(*p*) *Robson* v. *Bennett*, 2 Taunt. 388.

(*q*) *Chalie* v. *Belshaw*, 6 Bing. 529; 4 M. & P. 275, S. C.

(*r*) Note (*e*), p. 188.

(*s*) *Clarke* v. *Cock*, 4 East, 57; *Cox* v. *Coleman*, Bayley, 6th ed. 176; *Wynne* v. *Raikes*, 5 East, 514; *Mendizabal* v. *Machado*, 6 C. & P. 218; 3 Moore & S. 841, S. C.; see the American authorities to the same effect, Byles on Bills, 5th American edition, 313. As to what amounts to a promise to accept, see *Nicholson* v. *Ricketts*, 29 L. J., Q. B. 55.

and even after it had become due (*t*). It might even be given to a person by whose direction and on whose account the bill was drawn, though he were no party to the bill, and although the bill had been previously indorsed (*u*). Such a promise would have enured to the benefit of the indorsee, and of all other parties.

Is irrevocable.

It could not, therefore, be revoked by the drawee, though the party to whom it was given consented to the revocation, and though neither the indorsee nor any other party to the bill had notice of the acceptance (*x*).

What else amounts to acceptance of a foreign bill.

Where the drawee answered an application to accept the bill, by saying, "the bill should have attention," it was held that these words were ambiguous, and did not amount to an acceptance (*y*); so, an answer by the drawee, "there is your bill, it is all right," is no acceptance (*z*). The mere detention of a bill by the drawee would not, it seems, amount to an acceptance. "In support of this doctrine," says Abbott, C. J., "have been cited the opinions of some great and learned persons, entitled, undoubtedly, to the highest respect. It is not, however, supported by the authority of any decided case; for the cases have all been decided upon very special circumstances" (*a*). Drawee kept a bill drawn on him, which he was requested to accept and forward, a considerable time after he had been told by the payee that he should consider his detention of the bill as tantamount to an acceptance. He afterwards admitted that he had neglected to write an acceptance upon it, thinking it of no consequence, as he meant to pay it. Held, that, under the circumstances, the detention amounted to an acceptance (*b*). Where a bill, being presented and left for acceptance, was refused acceptance by the drawee, but remained afterwards for a considerable time in his hands, and was ultimately destroyed by him, held by three Judges

(*t*) *Powell* v. *Monnier*, 1 Atk. 611; *Wynne* v. *Raikes*, 5 East, 514.

(*u*) *Fairlee* v. *Herring*, 3 Bing. 625; *Grant* v. *Hunt*, 14 L. J., C. P. 106, and 1 C. B. 44, S. C.

(*x*) *Grant* v. *Hunt*, ibid.

(*y*) *Rees* v. *Warwick*, 2 B. & Ald. 113; 2 Stark. 411, S. C.; unless by the course of dealings it has been usually considered such.

(*z*) *Powell* v. *Jones*, 1 Esp. 17. See *Anderson* v. *Hick*, 3 Camp. 179; *Anderson* v. *Heath*, 4 M. & Sel. 303; *Hoare* v. *Dresser*, Dom. Proc., 7 House of Lords Cases, 290; *Reynolds* v. *Peto*, 11 Exch. 418.

(*a*) *Mason* v. *Barff*, 2 B. & Ald. 26.

(*b*) *Harvey* v. *Martin*, 1 Camp. 425; Bayley, 6th ed. 193; and see *Trimmer* v. *Oddie*, there cited.

CHAPTER XIII.

(*dissentiente*, Lord Ellenborough, C. J.), that the drawee was not thereby liable as the acceptor of the bill (*c*). But, if the drawee had not previously refused acceptance, then, it seems, destroying the bill would have been such an act of ownership as would have amounted to acceptance (*d*). On the whole, it should seem that any conduct of the drawee, by which he intended the holder should understand that he meant to accept or pay, would have amounted to an acceptance of any existing foreign bill (*e*). A letter written by the drawee to the drawer might amount to an acceptance, though the drawer have been dead, and the drawee unacquainted with the fact (*f*).

What engagement the holder may require of the acceptor.

The holder is now entitled to require from the drawee an absolute engagement in writing, duly signed, to pay in money according to the tenor and effect of the bill, unincumbered with any condition or qualifications. A general acceptance, without any express words to restrain it, will be such an absolute acceptance.

What should be his conduct in case of qualified acceptance.

If the drawee offer a qualified acceptance, the holder may either refuse or accept the offer. If he mean to refuse it, he may note the bill, and should give notice of the dishonour to the antecedent parties. If he intend to acquiesce in it, he must give notice of the nature of the acceptance to the previous parties, and, it should seem, must obtain their consent (*g*), or they will be discharged (*h*); but he must not protest or note the bill, or give a general notice of dishonour,

(*c*) *Jeune* v. *Ward*, 1 B. & Ald. 653; 2 Stark. 326, S. C.

(*d*) Ibid.

(*e*) *Billing* v. *Devaux*, 11 L. J., C. P. 38; 3 M. & G. 565, S. C.

(*f*) Ibid.

(*g*) Perhaps it might not be necessary to obtain the consent to an acceptance for part of the amount.

It has been doubted whether an acceptance payable at a particular place, and not otherwise or elsewhere, can be safely taken without the consent of the prior parties since 1 & 2 Geo. 4, c. 78.

(*h*) Chitty on Bills, 9th ed. 300; Marius, 68, 85; and see the observations of Bayley, J., in *Sebag* v. *Abitbol*, 4 M. & Sel. 462; 1 Stark. 79, S. C.; and the answers of the Judges to the third question put to them in *Rowe* v. *Young*, 2 B. & B. 244; 2 Bligh, 391, S. C.; *Outhwaite* v. *Luntley*, 4 Camp. 179. Acquiescence in an acceptance at a longer date destroys the remedy against the prior parties according to the Scotch law. Glen, 2nd ed. 115. So it did according to the old French law. Poth. 49. The Code de Commerce, Art. 124, avoids conditional acceptances, but allows acceptances for part of the sum and acceptances varying in the place of payment. Art. 123. A varying acceptance, though void as to other parties, would be binding between the contracting parties. Nouguier, Lettres de Change, vol. 1, p. 234.

for he would thereby preclude himself from recovering against the acceptor (*i*).

Qualified acceptance.

Qualified acceptances are of two kinds: first, *conditional;* and, secondly, *partial*, or *varying* from the tenor of the bill.

Conditional acceptance.

Whether an acceptance be conditional or not, is a question of law (*k*). Acceptances, "to pay as remitted for" (*l*), "to pay when in cash for the cargo of the ship Thetis" (*m*), "to pay when goods consigned to him (the drawee) were sold" (*n*), an answer, that a bill would not be accepted till a Navy bill was paid, have respectively been held to be conditional acceptances. So where, on the presentment of bills for acceptance, the drawee said he would have accepted them if he had had certain funds which he had not been able to obtain from France, but that when he did obtain them he would pay the bill, this was held to amount to a conditional acceptance (*o*). The words "accepted payable on giving up a bill of lading" constitute a conditional acceptance, but not a further condition to the acceptor's liability, that the bill of lading shall be given up on the day of maturity of the bill (*p*). When the acceptance is in writing, and absolute, it may be suspended on a condition by another contemporaneous writing (*q*).

But a mere oral condition (at least, if contemporaneous with the acceptance) is inadmissible in evidence to qualify the absolute written engagement, even between the original parties. "This would be," says Lord Ellenborough, "incorporating with a written contract an incongruous parol condition, which is contrary to first principles" (*r*). And though the condition be *written* on a distinct paper, it cannot be available against an indorsee ignorant of the existence of such a paper (*s*).

(*i*) *Sproat* v. *Matthews*, 1 T. R. 182; *Bentinck* v. *Dorrien*, 6 East, 200; 2 Smith, 336, S. C.; Chit. 9th ed. 301.

(*k*) *Sproat* v. *Matthews*, 1 T. R. 182.

(*l*) *Banbury* v. *Lissett*, 2 Stra. 1211.

(*m*) *Julian* v. *Shobrooke*, 2 Wils 9.

(*n*) *Smith* v. *Abbott*, 2 Stra. 1152.

(*o*) *Mendizabal* v. *Machado*, 6 C. & P. 218; 8 M. & Scott, 841, S. C.

(*p*) *Smith* v. *Vertue*, 80 L. J., C. P. 56; 9 C. B., N. S. 214, S. C.

(*q*) *Bowerbank* v. *Monteiro*, 4 Taunt. 844; but see 1 & 2 Geo. 4, c. 78, s. 2; 19 & 20 Vict. c. 97, s. 6; and see *Spiller* v. *Westlake*, 2 B. & Ad. 157; *Gibbon* v. *Scott*, 2 Stark. 286.

(*r*) *Hoare* v. *Graham*, 3 Camp. 57; *Adams* v. *Wordley*, 1 M. & W. 374; 2 Gale, 29, S. C.; *Besant* v. *Cross*, 10 C. B. 896. And see *ante*, Chap. VIII., note (*m*).

(*s*) *Bowerbank* v. *Monteiro*, 4

CHAPTER XIII.

Though, when the condition is performed, a conditional acceptance becomes absolute, yet, in pleading, it should be declared on as a conditional acceptance, with an averment that the condition has been fulfilled (*t*).

Partial or varying acceptance.

A partial or varying acceptance varies from the tenor of the bill, as where it engages to pay part of the sum. Drawee accepted a foreign bill for 127*l.* 18*s.* 4*d.*, as far as 100*l.* part thereof: he was sued on the acceptance, and it was held good, *pro tanto*, within the custom of merchants (*u*). Or, to pay at a different time from that at which the bill is made payable by the drawer (*v*). A bill was accepted in this form, "Accepted on the condition of its being *renewed* till 28th Nov. 1844." This was held to be a varying acceptance on which the holder might insist against the acceptor, and that the word *renewed* might be read to mean an extension of the time when the bill was to become payable (*x*). An acceptance which unnecessarily and inaccurately states the time of maturity is not a varying acceptance (*y*).

Payable at a particular place.

Before the 1 & 2 Geo. 4, c. 78, it was a point much disputed, whether, if a bill payable generally was accepted payable at a particular place, such an acceptance was a qualified one. That statute, however, has now settled, that an acceptance, payable at a banker's, or other particular place, is, *as against the acceptor*, a general acceptance unless the acceptor express, in his acceptance, that the bill is payable there only (*z*), and not otherwise or elsewhere (*a*).

If the customer of a banker accept a bill, and make it payable at his banker's, that is of itself a sufficient authority

Taunt. 844. See Chapter VII. on IRREGULAR INSTRUMENTS.

(*t*) *Langston* v. *Corney*, 4 Camp. 176; 1 Marsh. 176; 1 D. & R., N. P. C. 33; *Ralli* v. *Sarrell*, 1 D. & R., N. P. C. 33; see a form, *Swann* v. *Cox*, 1 Marsh. 176.

(*u*) *Wegersloffe* v. *Keene*, 1 Stra. 214.

(*v*) Molloy, 283; *Walker* v. *Atwood*, 11 Mod. 190. In this case the acceptance was held good within the custom of merchants, but the case is no authority to show that the prior parties would not be discharged if such an acceptance were taken without their consent.

(*x*) *Russell* v. *Phillips*, 19 L. J., Q. B. 297; 14 Q. B. 891, S. C.

(*y*) *Fanshawe* v. *Peat*, 26 L. J., Ex. 314; 2 H. & N. 1, S. C.

(*z*) An acceptance omitting the word *only*, and stating the bill to be payable at a particular place, and not elsewhere, is a special acceptance. *Siggers* v. *Nichols*, Q. B., H. T. 1839; 3 Jurist, 84, S. C.

(*a*) It will be observed, that this part of the statute applies to all bills, foreign as well as inland. See, as to the effect of the statute, cap. 14.

to the banker to apply the customer's funds in paying the bill (*b*).

Presentment for payment there.

As to the manner in which a bill drawn or accepted payable at a particular place should be presented for payment, and as to the form of pleading, see the next Chapter on PRESENTMENT FOR PAYMENT.

Effect of two acceptances on the same bill.

Although, as we have seen, there cannot be two acceptances on the same bill, except for honour (*c*), yet if such a second acceptance be on the bill, it may amount to a guarantee (*d*).

If the drawee of a foreign bill, drawn in sets, accept both sets, and they are afterwards in the hands of two different holders, he may become liable to each (*e*).

Delivery or notice necessary to complete acceptance.

The liability of the acceptor, though irrevocable when complete (*f*), does not attach by merely writing his name, but upon the subsequent delivery of the bill, or upon communication to some person interested in the bill, that it has been so accepted. "La raison est," says Pothier, "que le concours de volontés, qui forme un contrat, est un concours de volontés que les parties se sont réciproquement déclarés ; sans cela, la volonté d'une partie ne peut acquérir de droit à l'autre partie, ni par conséquent être irrévocable. Suivant ces principes pour que le contrat entre le propriétaire de la lettre et celui sur qui elle est tirée soit parfait, il ne suffit pas que celui-ci ait eu pendant quelque temps la volonté d'accepter la lettre, et qu'il ait écrit au bas qu'il l'acceptait ; tant qu'il n'a pas déclaré cette volonté, le contrat n'est pas parfait ; il peut changer de volonté et rayer son acceptation."

Cancellation of acceptance by the drawee.

Hence it follows, that if the drawee has written his name on the bill, with the intention to accept, he is at liberty to cancel his acceptance at any time before the bill is delivered, or at least before the fact of acceptance is communicated to the holder (*g*).

(*b*) *Keymer* v. *Laurie*, 18 L. J., Q. B. 218.

(*c*) As to which see ACCEPTANCE SUPRA PROTEST.

(*d*) *Jackson* v. *Hudson*, 2 Camp. 447.

(*e*) See *Holdsworth* v. *Hunter*, 10 B. & C. 451; *Perreira* v. *Jopp*, ibid.

(*f*) *Thornton* v. *Dick*, 4 Esp. 270; *Trimmer* v. *Oddie*, Bayley, 6th ed. 204.

(*g*) *Cox* v. *Troy*, 5 B. & Ald. 474; 1 D. & R. 88, S. C.; see *Bentinck* v. *Dorrien*, 6 East, 199; 2 Smith, 337, S. C.; Marius, 20; and see *Ralli* v. *Dennistoun*, 6 Exch. 483; *Chapman* v. *Cottrell*, 34 L. J. 186.

CHAPTER XIII.

Cancellation by the acceptor's banker.

If a banker, with whom a bill is made payable by the acceptor, cancel the acceptance by mistake, without any want of due care, and return the bill so defaced, refusing to pay it, he does not thereby necessarily incur any legal liability (*h*). But if the banker, in so doing, be guilty of want of due care, an action lies against him at the suit of the holder, for the special damage actually sustained by the cancellation of the bill. Where an acceptance has been cancelled by mistake, it is the usage in the city of London to return the bill with the words "cancelled by mistake" written on it. The proper and safer mode of cancelling is to draw the pen through the name, so as to leave it legible (*i*).

Cancellation by other parties.

And upon the same principle it has been held that a cancellation of the acceptance by mistake made by other parties does not destroy the bill (*k*).

Liability of acceptor.

The acceptor is now considered, in all cases, as the party primarily liable on the bill. He is to be treated as the principal debtor to the holder, and the other parties as sureties liable on his default (*l*). The acceptor of a bill stands for most purposes in the same situation as the maker of a note, and therefore most of the following observations will apply to the latter also.

How discharged.

The acceptor's liability can only be discharged by payment, or other satisfaction, by release, or by waiver.

Payment, satisfaction, and release, we shall consider hereafter.

By waiver.

It is a general rule of law, that a simple contract may, *before breach*, be waived or discharged, without a deed and without consideration ; but after breach there can be no discharge, except by deed, or upon sufficient consideration (*m*). To this rule it has been repeatedly held that contracts on bills of exchange form an exception, and that the liability

(*h*) *Novelli* v. *Rossi*, 2 B. & Ad. 757; *Warwick* v. *Rogers*, 5 Man. & G. 340.

(*i*) See the observations of Abbott, C. J., in *Wilkinson* v. *Johnson*, 3 B. & C. 428; and see *Ingham* v. *Primrose*, 28 L. J., C. P. 294; 7 C. B., N. S. 82.

(*k*) *Raper* v. *Birkbeck*, 15 East, 17; *quære*, as to the effect of the decision in *Davidson* v. *Cooper*, 11 M. & W. 778, on some cases of cancellation.

(*l*) *Fentum* v. *Pocock*, 5 Taunt. 192; 1 Marsh, 14, S. C.

(*m*) Com. Dig. Action on the Case in Assumpsit, G; *Fitch* v. *Sutton*, 5 East, 230; *Dobson* v. *Espie*, 26 L. J., Ex. 241; 2 H. & N. 79, S. C.

of the acceptor, or other party remote or immediate, though complete, may be discharged by an express renunciation of his claim on the part of the holder (*n*), without consideration. This exception seems at first sight to violate a fundamental rule, but the reason may be that the distinction between a release under seal and a release not under seal is quite unknown in most foreign countries. An express and complete renunciation by the holder of his claim on any party to the bill is therefore according to the law merchant equivalent to a release under seal. And as it would be highly inconvenient to introduce nice distinctions and nice questions of international law, all the contracts on a foreign bill, though negotiated or made in England, and all the contracts on an inland bill, depending, as they do, on the same law merchant, may be so released. And such a relaxation of the general rule in the case of bills of exchange is not unreasonable on another ground. The money due at the maturity of a bill of exchange is in practice expected to be paid immediately, and, in many cases, with remedies over in favour of the debtor. Parties liable, who are expressly told that recourse will not, in any event, be had to them, are almost sure, in consequence, to alter their conduct and position. Joint indorsees against acceptors:—It was proved that the plaintiffs knew the acceptance was for the accommodation of the drawer, and that they had said, at a meeting of the defendant's creditors, "that they looked to the drawer, and should not come upon the acceptors." They had at this time goods of the drawer in their hands, which afterwards turned out of little value. Lord Ellenborough directed the jury to consider, "whether the language employed by the plaintiffs amounted to an absolute unconditional renunciation by them, as holders of the bill, of all claims in respect of it upon the defendants, as acceptors. In that case the acceptors were discharged from their liability: the holders had made their election, and could now openly proceed against the drawer. On the other hand, if the words only imported that they looked to the drawer in the first instance, that it was not then necessary to come upon

(*n*) The law seems now to be so settled in accordance with prior decisions and with the law of France and other countries, where the distinction between simple contracts and contracts under seal is unknown. "Le créancier peut renoncer à son droit d'exiger le payement de ce que lui doit son débiteur; c'est ce qu'on appelle faire remise." (Pardessus, Droit Commercial, vol. 1, p. 272, 6th ed., Paris.) See the judgment of Parke, B., in *Foster* v. *Dawber*, 6 Exch. 851; see also Nouguier des Lettres de Change, vol. 1, p. 353. See also *Dobson* v. *Espie*, 26 L. J., Ex. 240; 2 H. & N. 79, S. C.

CHAPTER XIII.

the acceptors, and that they should not resort to them if satisfaction could be obtained in another quarter, they did not waive their remedy by this conditional promise, and the acceptors still continued liable until the bill should be actually paid" (*o*). Receiving interest from the drawer will not discharge the acceptor. Nothing short of an express discharge will do (*p*). Where the discharge is entirely in writing, its interpretation and effect is for the Court, where it is not, the question is for the jury. If the renunciation be not express, and for the whole amount, there must be a consideration (*q*).

Cancellation by the holder.

The cancellation of the acceptor's name by the holder is a waiver of the acceptance. Where a third person cancels, it is a question for the jury whether that cancellation were with the assent of the holder (*r*).

Security by specialty.

The liability of the acceptor, as such, will also be extinguished, by taking from him a co-extensive security by specialty (*s*). But if the new security recognize the bill or note as still existing, it is not extinguished (*t*). Where one of three partners, after a dissolution of partnership, undertook, by deed made between the partner, to pay a particular partnership debt on two bills of exchange, and that was communicated to the holder, who consented to take the separate notes of the one partner for the amount, strictly preserving his right against all three, and retained possession of the original bills, it was held that, the separate notes having proved unproductive, he might still resort to his remedy against the other partners, and that the taking, under these circumstances, the separate notes, and even afterwards renewing them several times successively, did

(*o*) *Whatley* v. *Tricker*, 1 Camp. 35.

(*p*) *Dingwall* v. *Dunster*, Doug. 235; and *Black* v. *Peel*, and *Walpole* v. *Pulteney*, there cited; *Anderson* v. *Cleveland*, 13 East, 430, n.; *Farquhar* v. *Southey*, M. & M. 14; 2 C. & P. 497, S. C.; *Adams* v. *Gregg*, 2 Stark. 531; *Stevens* v. *Thacker*, Peake, 187. So it has been held, that a right to sue the drawer may be waived. *Delatorre* v. *Barclay*, 1 Stark. 7; see *Cartwright* v. *Williams*, 2 Stark. 340, ante; *Adams* v. *Gregg*, 2 Stark. 531; see Story on Bills, s. 252; see also *Steele* v. *Harmer*, 15 L. J., Exch. 217; 14 M. & W. 831, S. C., and 4 Exch. 1, in error. As to pleading a waiver, see *Steele* v. *Benham*, 3 D. & L. 506.

(*q*) *Parker* v. *Leigh*. 2 Stark. 228; *Farquhar* v. *Southey*, 2 C. & P. 497; *Owen* v. *Pizey*, 11 W. R., C. P. 21.

(*r*) *Sweeting* v. *Halse*, 9 B. & C. 365; 4 M. & R. 287, S. C.

(*s*) *Ansell* v. *Baker*, 15 Q. B. 20.

(*t*) *Twopenny* v. *Young*, 3 B. & C. 208; 5 D. & R. 259, S. C.

not amount to satisfaction of the joint debt (*u*). But, in general, the taking a separate bill of one of two joint acceptors of a former bill is a relinquishment of all claim on the former security (*x*).

Pleading.

A plea of waiver must state that the party waiving was the holder of the bill at the time of the waiver (*y*).

What acceptance admits.

By acceptance, the drawee admits the signature and capacity of the drawer, and cannot, after thus giving the bill currency, be admitted to prove that the drawer's signature was forged (*z*). He moreover admits, and so does the maker of a promissory note, the then capacity of the payee, to whose order the bill or note is made payable, to indorse. Hence the acceptor is estopped from saying that the payee being a bankrupt could not indorse (*a*), and even from saying that a second bankruptcy before the acceptance precluded him from indorsing, though the effect of such second bankruptcy be (*b*) to vest, *ipso facto*, all the bankrupt's property in his assignees (*c*). Neither can the acceptor be allowed to defeat the indorsement by setting up the infancy of the payee (*d*). Nor can the acceptor plead that the drawer to whose order the bill was made payable, being a corporation, had no authority to indorse (*e*); nor that the drawer was a married woman, although as the husband may sue or indorse, the consequence may be that the acceptor may possibly be compelled to pay the bill twice (*f*). Nor that the drawing and first indorsing were in the name of a deceased person (*g*). But the acceptance of a bill drawn and indorsed in the name of a really existing person is no

(*u*) *Bedford* v. *Deakin*, 2 B. & Ald. 210; 2 Stark. 178, S. C.

(*x*) *Evans* v. *Drummond*, 4 Esp. 89; *Reed* v. *White*, 5 Esp. 122; *Thompson* v. *Percival*, 5 B. & Ad. 925; 3 N. & M. 667, S. C.

(*y*) *Steele* v. *Harmer*, 15 L. J., Exch. 217; 14 M. & W. 136, S. C. As to this point affirmed in error, 4 Exch. 1.

(*z*) *Price v. Neal*, 3 Burr. 1354; 1 W. Bl. 390, S. C.; *Porthouse* v. *Parker*, 1 Camp. 82; *Prince* v. *Brunatte*, 1 Bing. N. C. 435; 1 Scott, 342; 3 Dowl. 382, S. C.; *Wilkinson* v. *Lutwidge*, 1 Stra. 648; *Jenys* v. *Fawler*, 2 Stra. 946; and see *Bass* v. *Clive*, 4 M. & Sel. 13; 4 Camp. 78, S. C. *Phillips* v. *Im Thurn*, L. R., 1 C. P. 463; 35 L. J., 220, S. C.

(*a*) *Drayton* v. *Dale*, 2 B. & C. 293; 3 D. & Ry. 534, S. C.; *Braithwaite* v. *Gardiner*, 8 Q. B. 473.

(*b*) 6 Geo. 4, c. 16, s. 127.

(*c*) *Pitt* v. *Chappelow*, 8 M. & W. 616.

(*d*) *Taylor* v. *Crocker*, 4 Esp. 187; *Jones* v. *Darch*, 4 Price, 300.

(*e*) *Halifax* v. *Lyle*, 19 L. J., Exch. 197; 3 Exch. 446, S. C.

(*f*) *Smith* v. *Marsack*, 18 L. J., C. P. 68; 6 C. B. 486.

(*g*) *Ashpitle* v. *Bryan*, 32 L. J., Q. B. 91; 3 Best & S. 474, affirmed in error, 33 L. J., Q. B. 328.

CHAPTER XIII.

admission of the handwriting of the *indorser* (*h*), unless at the time of the acceptance the drawee knew of the forgery, and intended that the bill should be put into circulation by a forged indorsement (*i*). And the acceptance of a bill purporting to be already indorsed by the payee, not being the drawer, is no admission of the genuineness of the indorsement (*j*), and it is conceived that the law is the same though the bill be payable to the drawer's own order (*k*). So where the drawing is by procuration, the authority of the agent to draw is admitted, but not his authority to indorse (*l*). But where the bill is drawn in a *fictitious name*, the acceptor undertakes to pay to an indorsement by the same hand (*m*).

Where drawee precluded from disputing acceptance.

If the drawee has once admitted that the acceptance is in his own handwriting, and thereby given currency to the bill, he cannot afterwards exonerate himself by showing that it was forged (*n*).

(*h*) *Smith* v. *Chester*, 1 T. R. 655; *Carvick* v. *Vickery*, Doug. 2nd ed. 653, n. 134.

(*i*) *Beeman* v. *Duck*, 11 M. & W. 251.

(*j*) *Tucker* v. *Robarts*, 18 L. J., Q. B. 169; 22 L. J., Q. B. 270; in error, 16 Q. B. 560, S. C.

(*k*) Story on Bills, p. 489; but see a dictum of Patteson, J., in *Tucker* v. *Robarts*, supra; *Beeman* v. *Duck*, supra.

(*l*) *Robinson* v. *Yarrow*, 7 Taunt. 455; 1 Moore, 150, S. C.

(*m*) *Cooper* v. *Mayer*, 10 B. & C. 468; 5 M. & R. 387, S. C.; *Beeman* v. *Duck*, 11 M. & W. 251; and see *Taylor* v. *Croker*, 4 Esp. 187; *Bass* v. *Clive*, 4 M. & S. 13; 4 Camp. 78, S. C. See *Phillips* v. *Im Thurn*, 35 L. J., C. P. 220; L. R., 1 C. P. 463, S. C. It seems that a bill drawn and indorsed in a fictitious or forged name, to the knowledge of the drawer, should be declared on as payable to bearer. See *Phillips* v. *Im Thurn*, ante, and *Beeman* v. *Duck*, 11 M. & W. 251.

(*n*) *Leach* v. *Buchanan*, 4 Esp, 226.

CHAPTER XIV.

OF PRESENTMENT FOR PAYMENT.

How made . . . 201
In case of Bankruptcy or Insolvency . . . 202
Unnecessary to charge a Guarantor . . . 203
Where Drawee absconds . 203
In case of Drawee's Death 203
Of Holder's Death . . 203
When to be made . . 203
Time, how computed . . 203
Months 204
Days 204
Bills and Notes at Sight . 204
Usance 204
Old and New Style . . 205
Days of Grace . . . 205
What in different Countries 205
How reckoned . . . 206
Sundays and Holidays, how reckoned . . . 206
Presentment before expiration of Days of Grace . 206
On what Instruments Days of Grace allowed . . 206
When Presentment of Bill payable at Sight is to be made 207
Of a Bill payable after Sight 207
Of a Bill of Exchange payable on Demand . . 207
General Rule . . . 208
Different Sorts of Instruments payable on Demand 208
Of a common Bill of Exchange payable on Demand 209
Of a Check . . . 209
Of a common Promissory Note payable on Demand 209
Of a Bank Note . . 209
Of other Bankers' Paper . 210
When no Time of Payment is specified . . . 210
At what Hour . . . 210
Where, when a Bill is made payable at a particular Place 211
In an Action against Indorser 212
Pleading 213
When a Note is made so payable . . . 214
Supplementary Memorandum 214
Consequence of not duly Presenting . . . 215
Presentment not necessary to charge Acceptor . 215
WHEN NEGLECT TO PRESENT EXCUSED . . 215
Of Bill seized under Extent 215
By circulating . . . 215
By the Absconding of the Drawee . . . 216
By Absence of Effects in the Drawee's Hands . 216
Not by Declaration of Acceptor that he will not pay 216
By returning Notes . . 216
Advantage from Neglect, how waived . . . 216
Pleading 217
Evidence of Presentment . 217

How made.

A PERSONAL demand on the drawee or acceptor is not necessary (*a*). It is sufficient if the bill be exhibited and

(*a*) And it has been held in America, that if made by a notary on the drawee in the street, away from his place of business, it is insufficient. Byles on Bills, 5th American edition, p. 328.

CHAPTER XIV.

payment be demanded at his usual residence or place of business, of his wife or other agent; for it is the duty of an acceptor, if he is not himself present, to leave provision for the payment (*b*). And it is sufficient if payment be demanded of an agent who has been authorized to pay, or has usually paid bills for the drawee.

Where a promissory note is payable at either of two places, presentment at either of them will suffice. Thus, where a country bank note was made payable both at Tunbridge and in London, presentment in London was held sufficient, though it was proved that, had it been presented at Tunbridge, the nearest place, it would have been paid (*c*). But it is conceived that presentment of a check to the London bankers of the drawee, though described on the check as agents, is insufficient, for the obligation to pay a check must in general depend on the state of the drawer's account, which the London agents may not know (*d*). The bill or note ought to be exhibited (*e*), for it should be then and there delivered up. The party presenting should also be ready and authorized to receive the money, and has no right (at least, unless usage requires it) to impose on the drawee any trouble or risk in remitting the money elsewhere (*f*).

In case of bankruptcy or insolvency.

The bankruptcy or insolvency of the drawee is no excuse for a neglect to present for payment; for many means may remain of obtaining payment, by the assistance of friends or otherwise (*g*). It has been held in the King's Bench, that the shutting up of a bank, when any demand there made would have been inaudible, is substantially a refusal by the bankers to pay their notes, to all the world (*h*). But it was decided in the same case, on error in the Exchequer Chamber, that an allegation in the declaration, that the makers became insolvent, and ceased, and wholly declined and refused, then and thenceforth to pay, at the place specified, any of their notes, is insufficient, not being

(*b*) *Matthews* v. *Haydon*, 2 Esp. 509; *Brown* v. *M'Dermot*, 5 Esp. 265. If the bill be payable at a particular place, see post.

(*c*) *Beeching* v. *Gower*, Holt, N. P. C. 313.

(*d*) *Bailey* v. *Bodenham*, 33 L. J., C. P. 252.

(*e*) See the American authorities, Byles on Bills, 4th American edition.

(*f*) See *Bailey* v. *Bodenham*, 33 L. J., C. P. 255.

(*g*) *Russel* v. *Langstaffe*, Doug. 496; *Warrington* v. *Furbor*, 8 East, 245; *Nicholson* v. *Gouthit*, 2 H. Bl. 609; *Ex parte Johnstone*, 1 Mont. & Ayr. 622; 3 Deac. & Chitty, 433, S. C.; *Esdaile* v. *Sowerby*, 11 East, 114; *Lafitte* v. *Slatter*, 6 Bing. 623; 4 M. & P. 457, S. C.; *Camidge* v. *Allenby*, 6 B. & C. 373; 9 D. & R. 391.

(*h*) *Howe* v. *Bowes*, 16 East, 112.

equivalent to an allegation of presentment (*i*). But it is conceived, notwithstanding the observations of the Court in the last case, that it cannot be necessary for the holders of the notes of a bank which has notoriously stopped payment, and is shut up, to go through the empty form of carrying their notes up to the bank doors, and then carrying them home again (*k*).

Unnecessary to charge a guarantor.

A presentment for payment is now decided not to be necessary in order to charge a man who guarantees the due payment of a bill or note (*l*). And it had before been held that where a party was a guarantee for the vendee of goods, who had accepted a bill for the amount, and then became bankrupt, the notorious insolvency of the vendee was sufficient so far to excuse the drawer as to enable him to charge the guarantee, unless it could have been shown that the bill would have been paid if duly presented, though it would have been otherwise in an action on the bill (*m*).

Where the drawee absconds.

If the drawee has shut up his house, the holder must inquire after him, and attempt to find him out.

In case of death of drawee.

If the drawee be dead, presentment must be made to his personal representatives; and, if he have none, then at his house (*n*).

Of holder.

If the holder die, presentment should be made by his personal representatives.

When to be made.

In treating of the time *when* presentment is to be made, it will be necessary to consider, first, how, on the various sorts of bills, time is computed, and then on what bills, and to what extent, days of grace are allowed.

Time, how computed.

In Acts of Parliament passed before the end of the year 1850 (*o*), in deeds, in other contracts and written instru-

(*i*) 5 Taunt. 30, S. C. in error.

(*k*) Since the above observations were written, I observe that the point has been so ruled at Nisi Prius and afterwards at Chambers. See *Henderson* v. *Appleton*, Chitty, 9th ed. 356, and *Rogers* v. *Langford*, 1 C. & M. 637, where Lord Lyndhurst says, "It is possible, if you had returned the notes in due time, that might have done instead of presentment." See also *Turner* v. *Stones*, 1 Dow. & L. 122; *Sands v. Clarke*, 19 L. J., C. P. 84; *Main's case*, 5 Rep. 21 a; *Robson* v. *Oliver*, 10 Q. B. 704.

(*l*) *Hitchcock* v. *Humfrey*, 5 & G. 559; *Walton* v. *Mascall*, 13 M. & W. 453.

(*m*) *Warrington* v. *Furbor*, 8 East, 242; 6 Esp. 89, S. C.

(*n*) Chitty, 9th ed. 357.

(*o*) 13 & 14 Vict. c. 21, s. 4.

CHAPTER XIV.

Months.

ments, and in legal proceedings, the word *month* is taken to mean a lunar, and not a calendar, month, unless there be something in the context to indicate the latter sense (*p*); but in matters ecclesiastical, in Acts of Parliament passed after the year 1850 (*q*), and, by the custom of trade, in bills and notes, a month is deemed to be a calendar or solar month (*r*).

The inequality in the length of the respective months may sometimes occasion a difficulty, but it is said to be a rule not to extend the time at which the bill falls due beyond the month in which it would have fallen due, had that month been of the length of thirty-one days. Thus, if a bill at one month be drawn on the 31st of January, it will be due on the 28th of February, and, with the days of grace, payable on the 3rd of March (*s*).

Days.

When a bill is drawn at a certain number of days after date or after sight, those days are reckoned exclusively of the day on which the bill is drawn or accepted, and inclusively of the day on which it falls due (*t*).

Bills and notes at sight.

We have already observed, that on a *bill* the words "after sight" are equivalent to "after acceptance;" for sight must appear in a legal way. If a *note* be made payable at sight, it must be presented before action brought against the maker (*u*).

Usance.

Usance is the period which, in early times, it was usual to appoint between different countries for the payment of bills.—When usance is a month, half usance is always fifteen days (*x*), notwithstanding the unequal length of the months. An usance between London, Aleppo, Altona, and

(*p*) *Lang* v. *Gale*, 1 M. & Sel. 111; *Barksdale* v. *Morgan*, 4 Mo. 185; *Jocelyn* v. *Hawkins*, 1 Stra. 446, which, however, seems overruled by *Titus* v. *Lady Preston*, 1 Stra. 652. In a contract for purchase of lands, months are said to be *primâ facie* calendar months. *Hipwell* v. *Knight*, 1 Younge & C. 401; and see *Webb* v. *Fairmaner*, 3 Mees. & W. 474; see 1 Sug. Vend. & Pur. 402. The meaning of the word "month" in a charter-party has been left as a question for the jury. *Jolly* v. *Young*, 1 Esp. 186; *Reg.* v. *Chawton*, 1 Q. B. 247; see the authorities fully collected in *Simpson* v. *Margitson*, 11 Q. B. 23, and 2 Exch. 116.

(*q*) 13 & 14 Vict. c. 21, s. 4.

(*r*) *Cockell* v. *Gray*, 3 B. & B. 186.

(*s*) Marius, 75; Kyd, 4.

(*t*) So if a bill be drawn payable so many days after a certain event. Bayley on Bills, 6th ed. 245; *Coleman* v. *Sayer*, 1 Barnard, 303.

(*u*) *Dixon* v. *Nuttall*, 1 C., M. & R. 307; 6 C. & P. 320, S. C.

(*x*) Marius, 93.

Amsterdam, Antwerp, Brabant, Bruges, Flanders, Geneva, Germany, Hamburg, Holland, and the Netherlands, Lisle, Middleburg, Paris, or Amsterdam, Rotterdam, and Rouen, is one calendar month ; between London and the Spanish or Portuguese towns, two calendar months ; between London and Genoa, Venice, or places in Italy, it is three calendar months (*y*).

Old and new style.

It is said that all the countries with which the English are in the habit of negotiating bills, compute their time by the new style, with the single exception of Russia (*z*). In the case of bills drawn in a place using one style, and payable in a place using another, if drawn payable at a certain period after date, they fall due as they would have done in the country in which they were drawn. Thus, a bill drawn Feb. 1, in London, on St. Petersburg, at one month, would be payable, without the days of grace, on March 1, in our calendar ; and, as it was drawn on Jan. 21, old style, it would fall due on Feb. 21, in the Russian calendar. But, if the bill were drawn payable at a day certain, or at a certain period after sight, the time must then be reckoned according to the style of the place on which it is drawn (*a*).

Days of grace. What in different countries.

Days of grace are so called, because they were formerly allowed the drawee as a favour : but the laws of commercial countries have long since recognized them as a right. The number of these days varies in different places. Mr. Kyd, in his Treatise on Bills of Exchange, gives the following table, which, however, has been altered in many places since his day, by the substitution of the French code, and other circumstances :—

"Great Britain, Ireland, Bergamo, and Vienna, three days.

"Frankfort (*b*), out of the fair-time, four days.

"Leipsic, Naumburg, and Augsburg, five days.

"Venice (*c*), Amsterdam (*d*), Rotterdam (*d*), Middleburg, Antwerp (*d*), Cologne, Breslau, Nuremberg, and Portugal (*e*), six days.

"Dantzic, Königsberg, and France (*d*), ten days.

(*y*) Chitty, 10th ed. 254; Bayley, 203.

(*z*) Bayley, 201.

(*a*) Beawes, 444; Bayley, 202.

(*b*) *i. e.* on the Maine.

(*c*) Not including Sundays and holidays.

(*d*) Abolished by the French Code. "Tous délais de grâce, de faveur, d'usage, ou d'habitude locale pour le paiement de lettres de change, sont abrogés." Code de Commerce, liv. i. tit. 8, 135.

(*e*) Now, it is believed, in Lisbon and Oporto fifteen days on domestic, and six on foreign bills.

CHAPTER XIV.

"Hamburg and Stockholm, twelve days.

"Naples (*e*), eight; Spain, fourteen (*f*); Rome, fifteen; and Genoa, thirty days.

"Leghorn (*g*), Milan, and some other places in Italy, no fixed number.

"Sundays and holidays are included in the respite days, at London, Naples (*e*), Amsterdam (*e*), Rotterdam (*e*), Antwerp (*e*), Middleburg, Dantzic, Königsberg, and France (*e*); but not at Venice, Cologne, Breslau, and Nuremberg. At Hamburg, the day on which the bill falls due makes one of the days of grace; but it is not so elsewhere."

Three days of grace are allowed in North America, at Berlin, and in Scotland (*h*).

At Rio de Janeiro, Bahia, and other parts of Brazil, fifteen days.

At St. Petersburg, ten days on bills after date, three days on bills at sight, ten days on bills received and presented after they are due.

At Trieste and Vienna, three days on bills after date (*i*).

How reckoned.

The three days' grace allowed in this country are reckoned exclusive of the day on which the bill falls due, and inclusive of the last day of grace.

Sundays and holidays, how reckoned.

Where there are no days of grace, and the bill falls due on a Sunday, Christmas-day, Good Friday, public fast or thanksgiving day, or where the last of the days of grace happens on such a day, the bill becomes payable on the day preceding; and if not then paid, must be treated as dishonoured (*k*).

Presentment before expiration of days of grace.

A presentment for payment before the expiration of the days of grace is premature, and will not enable the holder to charge the antecedent parties (*l*).

On what instruments days of grace allowed.

Days of grace are allowed on promissory notes as well as on bills (*m*). They are allowed, whether the bill or note be

(*e*) See note (*d*) preceding page.

(*f*) But eight days of grace only are allowed on inland bills. At Cadiz only six days are allowed.

(*g*) Now none.

(*h*) See *Ferguson* v. *Douglas*, 6 Bro. P. C. 276.

(*i*) See Freese's Cam. Comp. part 2.

(*k*) *Tassell* v. *Lewis*, 1 Ld. Raym. 743; 39 & 40 Geo. 3, c. 42; 7 & 8 Geo. 4, c. 15. "Si l'échéance d'une lettre de change est à un jour férie légal, elle est payable la veille." Code de Commerce, liv. 1, tit. 8, 134.

(*l*) *Wiffen* v. *Roberts*, 1 Esp. 261.

(*m*) *Brown* v. *Harraden*, 4 T. R. 148.

made payable on a certain event, or at a certain day (*n*), or at a certain number of years, months, weeks, or days, after date or after sight, or at usance, or by instalments (*o*). But they are not allowed on bills or notes payable on demand (*p*). Whether days of grace are allowed on bills payable *at sight*, seems yet undecided (*q*). The weight of authority has been considered to incline in favour of such an allowance (*r*).

When presentment of bill payable at sight is to be made.

If days of grace are to be allowed on bills drawn payable at sight, the time when they should be presented has already been considered, in the Chapter on PRESENTMENT FOR ACCEPTANCE. If not, then they stand on the same footing as bills payable indefinitely, and bills payable on demand.

Of a bill payable after sight.

We have already seen that the time which bills payable *after* sight have to run is computed from the date of the acceptance (*s*); a note payable at a certain period after sight is payable at that period after presentment for sight (*t*). So, if some time after a refusal to accept, a bill payable after sight be accepted *supra protest*, the time is calculated, not from the date of the exhibition of the bill to the drawee, but from the date of the acceptance *supra protest* (*u*).

When presentment of bills payable on demand is to be made.

Bills and notes payable on demand, and checks, must be presented within a reasonable time. What is a reasonable time seems to be a question of law (*x*). And such a decision is conformable with the principles of law. "Reasonable time," says Lord Coke, "shall be adjudged by the discretion of the justices before whom the cause dependeth; and so it is of reasonable fines, customs and services, upon the true

(*n*) Ibid., and so held in America. *Griffin* v. *Goff*, 12 John's Rep. 423.

(*o*) *Oridge* v. *Sherborne*, 11 M. & W. 374; *Carlon* v. *Kenealy*, 12 M. & W. 139. If the whole be payable on default of payment of any one instalment the note is still a good promissory note. Ibid., and see *Miller* v. *Biddle*, Exch., M. T. 1865. Are three more days of grace to be allowed?

(*p*) Bayley, 241; Chitty, 10th ed. 261.

(*q*) Beawes, 256; Kyd, 10; Bayley, 198; *Dehers* v. *Harriott*, 1 Show. 163; *Coleman* v. *Sayer*, Barn. R. 303; 2 Stra. 829, S. C.; *Janson* v. *Thomas*, Bayley, 6th ed. 241; 3 Doug. 421, S. C.; *Dixon* v. *Nuttall*, 1 C., M. & R. 307; 6 C. & P. 320, S. C.

(*r*) Selw. N. P., 7th ed. 344.

(*s*) *Campbell* v. *French*, 6 T. R. 200; 2 H. Bl. 163, S. C.

(*t*) *Sturdy* v. *Henderson*, 4 B. & Ald. 592.

(*u*) *Williams* v. *Germaine*, 7 B. & C. 468; 1 M. & R. 394, S. C.

(*x*) *Tindal* v. *Brown*, 1 T. R. 168; *Darbyshire* v. *Parker*, 6 East, 3; 2 Smith, 195, S. C.; *Parker* v. *Gordon*, 7 East, 385; 3 Smith, 358, S. C.; *Haynes* v. *Birks*, 3 Bos. & Pul. 599; *Appleton* v. *Sweetapple*, Bayley, 6th ed. 234; 3 Doug. 137, S. C.

CHAPTER XIV.

state of the case depending before them: for reasonableness in these cases belongeth to the knowledge of the law; and therefore to be decided by the justices. *Quam longum esse debet non definitur in jure, sed pendet ex discretione justiciariorum.* And, this being said of time, the like may be said of things incertaine, which ought to be reasonable; for nothing that is contrary to reason is consonant to law" (*y*). Besides, the opinions of jurors have been so various, that there can be no certainty on the subject, unless it be held to be a question of law. Yet we have seen, that what is a reasonable time within which to present for acceptance a bill drawn payable after sight has been held a question of fact for the jury, and the same point has been ruled as to the time of presentment for payment of a note payable on demand (*z*).

General rule.

A man taking a bill or note payable on demand, or a check, is not bound, laying aside all other business, to present or transmit it for payment the very first opportunity. It has long since been decided, in numerous cases, that, though the party by whom the bill or note is to be paid live in the same place, it is not necessary to present the instrument for payment till the morning next after the day on which it was received (*a*). And later cases have established, that the holder of a check has the whole of the banking hours of the next day within which to present it for payment (*b*).

Different sorts of instruments payable on demand.

Negotiable instruments, payable on demand, may be distributed into several classes, and the time within which they ought to be presented for payment, and the consequences of a failure to make due presentment, are not precisely the same in every class.

Negotiable instruments payable on demand are common commercial bills of exchange, checks, common promissory notes, bank notes, and bankers' cash notes and bankers' bills:

(*y*) Co. Litt. 56, b.

(*z*) *Manwaring* v. *Harrison*, 1 Stra. 508; *Hankey* v. *Trotman*, 1 W. Bl. 1; see ante, p. 180, as to Presentment for Acceptance.

(*a*) *Ward* v *Evans*, 2 Ld. Raym. 928; 6 Mod. 36, S. C.; *Moore* v. *Warren*, 1 Stra. 415; *Fletcher* v. *Sandys*, 2 Stra. 1248; *Turner* v. *Mead*, 1 Stra. 416; *Hoar* v. *Da Costa*, 2 Stra. 910; *Appleton* v. *Sweetapple*, Bayley, 6th ed. 234; 3 Doug. 137, S. C.

(*b*) *Pocklington* v. *Sylvester*, Chitty, 9th ed. 385; *Robson* v. *Bennett*, 2 Taunt. 388; *Rickford* v. *Ridge*, 2 Camp. 537; *Moule* v. *Brown*, 4 Bing. N. C. 266; 5 Sco. 694, S. C.; *Hare* v. *Henty*, 30 L. J., C. B. 302. As to checks, see ante.

Of a common bill of exchange payable on demand.

It is conceived that a common bill of exchange (*c*) payable on demand ought, if the parties live in the same place, to be presented the next day after the payee has received it. If the bill must be sent by post to be presented, it ought to be posted on the day next after the day on which it was received, and then the person who receives it by post, that he may present it, should do so on the day next following the day on which he receives it.

Of a check.

Such, also, are the general rules regulating the presentment of bankers' cheques, which are really bills of exchange; but, as checks on bankers are now extremely common, it has been thought convenient to discuss the presentment of checks more in detail in the Chapter relating to Checks (*d*).

Of a common promissory note payable on demand.

A common promissory note payable on demand differs from a bill payable on demand, or a check, in this respect; the bill and check are evidently intended to be presented and paid immediately, and the drawer may have good reasons for desiring to withdraw his funds from the control of the drawee without delay; but a common promissory note (*e*) payable on demand is very often originally intended as a continuing security, and afterwards indorsed as such. Indeed, it is not uncommon for the payee, and afterwards for the indorsee, to receive from the maker interest periodically for many years on such a note. And sometimes the note is expressly made payable with interest, which clearly indicates the intention of the parties to be, that though the holder may demand payment immediately, yet he is not bound to do so. It is, therefore, conceived, that a common promissory note payable on demand, especially if made payable with interest, is not necessarily to be presented the next day after it has been received, in order to charge the indorser; and that, when the indorser defends himself on the ground of delay in presenting the note, it will be a question for the jury, whether, under all the circumstances, the delay of presentment was or was not unreasonable.

Of a bank note and bankers' cash note.

Bank notes and bankers' cash notes differ again from other promissory notes in this, that they are intended to pass

(*c*) The rule may be otherwise in respect of paper intended for circulation, and some descriptions of bankers' paper. *Shute* v. *Robins*, M. & M. 133; 3 C. & P. 80, S C. Or where peculiar difficulties interpose. See *James* v. *Houlditch*, 8 D. & R. 40.

(*d*) Ante, Chap. III. on CHECKS, where some peculiarities distinguishing checks from bills of exchange payable on demand are pointed out.

(*e*) *Brooks* v. *Mitchell*, 9 M. & W. 15. Bank of India v Dilon

CHAPTER XIV.

from hand to hand, and are issued that they may circulate as money, returning to the bank as seldom as possible; but they are not intended as a continuing security in the hands of any one holder. Therefore, a man who takes bank notes or bankers' cash notes in payment must present them (*f*), or forward them for presentment, the day after he receives them, in order to enable him, in the event of the bank failing, to sue the person from whom they were received on the consideration that was given for them (*g*). But, as it would be inconsistent with the very nature and design of such notes, that every man who takes them should present them for payment, it is sufficient to exonerate the taker from the charge of laches, if he circulated them within the time within which he ought otherwise to have presented them (*h*).

And without circulating them, it should seem that, if according to the course of business it be usual to retain such notes a reasonable time, that may be an excuse for omitting instant presentment (*i*). Moreover, the transmission of notes payable to bearer being attended with risk, the sender will, it seems, be allowed to cut the notes in halves, and send one set of halves on the next day, and one set the day after, or to send one set by coach and one by post (*k*). And it may make a difference in the time allowed for presentment if the notes be received by a servant or agent (*l*).

Of other bankers' paper.

The same rules which govern the presentment and circulation of bank notes also apply to such bankers' paper as may be fairly considered part of the circulation medium of the country. Such are the bills of a country banker on his London correspondent (*m*).

Where no time of payment is specified.

A bill or note on which no time of payment is specified is payable on demand (*n*).

At what hour.

Presentment for payment should be made during the usual hours of business, and, if at a banker's, within banking hours (*o*). If the party who is to pay the bill be not a

(*f*) *Vide* the Chapter on TRANSFER.

(*g*) *Camidge* v. *Allenby*, 6 B. & C. 373; 9 D. & R. 391, S. C.

(*h*) Ibid., *Robinson* v. *Hawksford*, 15 L. J., Q. B. 377; 9 Q. B. 52, S. C.

(*i*) See *Shute* v. *Robins*, M. & M. 133; 3 Car. & P. 80, S. C.

(*k*) *Williams* v. *Smith*, 2 B. & Ald. 496.

(*l*) *James* v. *Houlditch*, 8 D. & R. 40.

(*m*) *Shute* v. *Robins*, M. & M. 133; 3 C. & P. 80, S. C.

(*n*) Bayley, 6th ed. 115; *Whitlock* v. *Underwood*, 2 B. & C. 157; 3 D. & R. 356, S. C.; and see the Chapter on the FORM OF BILLS.

(*o*) *Parker* v. *Gordon*, 7 East, 385; 5 Smith, 358, S. C.; *Elford* v. *Teed*, 1 M. & Sel. 28; *Jameson*

Adams v Connell
3 L.R. Ex. 573.

banker, presentment may be made at any time of the day, when he may reasonably be expected to be found at his place of residence, or business, though it be six, seven, or eight o'clock in the evening (*p*). And even though there be no person within to return an answer (*q*). Lord Tenterden, C. J.: "As to bankers, it is established, with reference to a well-known rule of trade, that a presentment, out of hours of business, is not sufficient; but, in other cases, the rule of law is, that the bill must be presented at a reasonable hour. A presentment at twelve o'clock at night, when a person had retired to rest, would be unreasonable; but I cannot say that a presentment between seven and eight in the evening is not a presentment at a reasonable time" (*r*).

Where, when a bill is made payable at a particular place.

Where a bill or note was made or accepted payable at a particular place, it was formerly a point much disputed, whether a presentment at that place was necessary, in order to charge the acceptor, maker, or other parties. At length, as we have already seen, it was decided in the House of Lords, that an acceptance, payable at a particular place, was a qualified acceptance, rendering it necessary, in an action against the acceptor, to aver and prove presentment at such place (*s*). This decision occasioned the passing of the 1 & 2 Geo. 4, c. 78, by which it is enacted, that an acceptance, payable at a particular place, is a general acceptance, unless expressed to be payable there only, and not otherwise or elsewhere. On this statute it has been decided, that an acceptance is general, though the bill be made payable at a particular place by the drawer, and not by the acceptor (*t*).

v. *Swinton*, 2 Taunt. 224; *Whitaker* v. *Bank of England*, 1 C., M. & R. 744; 6 C. & P. 700, S. C. In this case the bill had been presented at 11 A.M., and payment had been refused for want of assets; it was afterwards, on the same day, presented after banking hours, at 6 P.M., assets having in the meantime been received. It was intimated by Lord Abinger, that the bank ought to have apprized the notary who presented the bill of the receipt of assets.

(*p*) *Barclay* v. *Bailey*, 2 Camp. 527; *Morgan* v. *Davison*, 1 Stark. 114.

(*q*) *Wilkins* v. *Jadis*, 2 B. & Ad. 188; 1 M. & Ry. 41, S. C.

(*r*) Ibid.; and see *Triggs* v. *Newnham*, 10 Moore, 249; 1 C. & P. 631, S. C.

In America it is held, that business hours, except in the case of banks, range through the whole day, down to the hours of rest in the evening. Where a note was made payable at a bank, a demand made at the bank upon the proper day after banking hours, the officers being there, and a refusal, the cashier stating that no funds were deposited for the purpose; held that the demand was sufficient. See Byles on Bills, 5th American edition, p. 341.

(*s*) *Rowe* v. *Young*, 2 B. & B. 165; 2 Bligh, 391, S. C.

(*t*) *Selby* v. *Eden*, 3 Bing. 611; 11 Moo. 511, S. C.; *Fayle* v. *Bird*,

CHAPTER XIV.

A declaration in an action against the *acceptor*, alleging a bill to be accepted payable at a banker's, need not aver presentment at the house of that banker (*u*). "Since the statute," says the Court of Error, "a bill drawn generally on a party may be accepted in three different forms, *i. e.*, either first, generally, or, secondly, payable at a particular banker's, or, thirdly, payable at a particular banker's and not elsewhere. If the drawee accepts in the second form, payable at a banker's, he undertakes, since the statute, to pay the bill at maturity when presented for payment, either to himself or at the banker's. Here the bill was accepted according to the second of these three forms" (*x*).

In an action against the indorser.

In an action against the *drawer*, or other indorser, if the bill be accepted, and payable at a particular place named by the *acceptor*, it is still necessary to prove presentment there (*y*). So if the bill be *drawn*, payable at a particular place, presentment must be made there in order to charge the drawer. "The doubt," says Tindal, C. J., "which had been formed before the statute, as to the effect of an acceptance, payable at a particular place, was confined to the case where the question arose between the holder and the acceptor: in cases between the indorsee and the drawer, upon a special acceptance by the drawee, no doubt appears to have existed, but that a presentment at a place specially designated *in the acceptance* was necessary, in order to make the drawer liable upon the dishonour of the bill by the acceptor. Still less did the doubt ever extend to cases where the drawer directed, by the body of the bill, that the money should be paid in a particular place. Such, then, being the state of the drawer's liability at the time the statute was passed, it must still remain the same, unless that statute has made an alteration therein. But it appears to us that the statute neither intended to alter, nor has it in any manner altered, the liability of drawers of bills of exchange, but that it is confined in its operation to the case of acceptance alone" (*z*).

If the bill be made payable at a banker's, a presentment there will suffice (*a*). And if the bill be accepted payable

6 B. & C. 531; 9 Dowl. & R. 639; 2 C. & P. 303, S. C.; *Roach* v. *Johnston*, Hayes & Jones, 246.

(*u*) *Halstead* v. *Skelton*, 5 Q. B. 92.

(*x*) Ibid.

(*y*) *Gibb* v. *Mather*, 8 Bing. 214; 1 M. & Sc. 387; 2 C. & J. 254, S. C.; *Saul* v. *Jones*, 28 L. J., Q. B. 37; 1 E. & E. 59, S. C.

(*z*) *Gibb* v. *Mather*, ubi supra. See *Parks* v. *Edge*, 1 C. & M. 429; 3 Tyr. 364, S. C.; *Harris* v. *Parker*, 3 Tyrw. 370; *Walter* v. *Cubley*, 2 C. & M. 151; 4 Tyr. 87, S. C.; *Boydell* v. *Harkness*, 3 C. B. 168.

(*a*) *Saunderson* v. *Judge*, 2 H.

at a banker's, which banker happens to become the holder at its maturity, that fact alone amounts to presentment, and no other proof is necessary (*b*). If a bill be made payable in a particular town, a presentment at all the banking houses there will suffice (*c*); if at one of two towns, a presentment at either (*d*); if a particular house be pointed out by the bill as the acceptor's residence, a presentment to any inmate (*e*), or, if the house be shut up, at the door will suffice (*f*).

Pleading.

But where a bill is accepted, payable at a particular place (*g*), it is not necessary in an action against the drawer (*h*) to state the acceptance in the declaration, and, therefore, not necessary to state it to be at a particular place, nor to allege presentment at that place. Such a presentment as the acceptance requires is merely matter of evidence (*i*). But if the special acceptance be alleged in the declaration, it may be necessary to state in an action against *a drawer or indorser* such a presentment as the acceptance requires, though a general allegation may suffice after verdict (*k*). If a bill be made payable at a particular place, it is not necessary to state a presentment *to the acceptor* there; it is sufficient to state a presentment at that place (*l*). An averment that a bill was presented to the

Bl. 509; *Harris* v. *Parker*, 3 Tyrw. 370.

(*b*) *Bailey* v. *Porter*, 14 M. & W. 44.

(*c*) *Hardy* v. *Woodroofe*, 2 Stark. 319.

(*d*) *Beeching* v. *Gower*, Holt, N. P. C. 313.

(*e*) *Buxton* v. *Jones*, 1 M. & G. 83.

(*f*) *Hine* v. *Allely*, 4 B. & Ad. 624; 1 N. & M. 433, S. C.

(*g*) In an action against the acceptor, the bill may be described as payable at a particular place, though not accepted payable there only. *Blake* v. *Beaumont*, 4 M. & G. 7.

(*h*) See further as to the pleadings in an action against the acceptor, the Chapter on PLEADING.

(*i*) *Parks* v. *Edge*, 1 C. & M. 429; 3 Tyrw. 364, S. C.; *Harris* v. *Packer*, 3 Tyrw. 370; *Hine* v. *Allely*, 4 B. & Ad. 624; 1 N. & M. 433, S. C.; and see *Hawkey* v. *Borwick*, 4 Bing. 135; *Hardy* v. *Woodroofe*, 2 Stark. 319.

(*k*) *Lyon* v. *Holt*, 5 M. & W. 250. The sufficiency, however, of such a general allegation, even after verdict, does not seem to be perfectly clear, at all events where no issue is taken on the presentment. In an action against the drawer, where the bill was drawn and accepted payable in London, but there was no traverse of the general allegation of presentment, it was held that the statement of the venue London in the margin of the declaration cured the defect. *Wilmot* v. *Williams*, 14 L. J., C. P. 33; 7 M. & Gr. 1017, S. C.; and see *Boydell* v. *Harkness*, 15 L. J., C. P. 233; 3 C. B. 168, S. C.

(*l*) *Shelton* v. *Braithwaite*, 8 M. & W. 252; *Hawkey* v. *Borwick*, 1 Y. & J. 376; 4 Bing. 135; 12 Moore, 478, S. C.; *Philpot* v. *Bryant*, 3 C. & P. 244; 4 Bing. 717; 1 M. & P. 754, S. C.; and

CHAPTER XIV.

acceptor will be satisfied by proof that it was presented at the place where it was made payable, though no person were there in attendance (*m*), and though the acceptor did not live there (*n*).

When a note is made so payable.

The statute 1 & 2 Geo. 4, c. 78 (*o*), does not extend to promissory notes. If, therefore, a note be, *in the body of it*, made payable at a particular place, it is still necessary to aver and to prove presentment there (*p*), though the mention of the place be in a distinct sentence preceded by a full stop (*q*).

By a supplementary memorandum.

But if the place of payment be merely mentioned in a memorandum, that is held to be only a direction, and not to qualify the contract; and, consequently, a presentment there is not essential (*r*). And an averment in the declaration

see *Bush* v. *Kinnear*, 6 M. & Sel. 210; *Huffam* v. *Ellis*, 3 Taunt. 415; *Ambrose* v. *Hopwood*, 2 Taunt. 61; *De Bergareche* v. *Pillin*, 3 Bing. 476; 11 Moore, 350, S. C.

(*m*) *Hine* v. *Allely*, 4 B. & Ad. 624; 1 N. & M. 433, S. C.; and see *Hardy* v. *Woodroofe*, 2 Stark. 319. So where a bill was drawn on an acceptor at 38, Minto-street, accepted generally, and when due, the acceptor having changed his residence, was presented to a lodger at No. 38, the presentment was held sufficient. *Buxton* v. *Jones*, 1 M. & Gr. 83; 1 Scott, N. R. 19, S. C.

(*n*) *Hardy* v. *Woodroofe*, 2 Stark. 319.

(*o*) But notwithstanding this act, and independently of the decision in *Gibb* v. *Mather*, 8 Bing. 214; 2 Moo. & Scott, 387, S. C., if a bill be accepted, payable at a particular place (though not expressed to be payable there only, and not otherwise or elsewhere), the addition of the place where payable is not surplusage; for, upon default made at that place, the right of the holder to sue the previous parties to the bill is complete. *Mackintosh* v. *Haydon*, Ryan & Moody, 362; *Hawkey* v. *Borwick*, 4 Bing. 135; 12 Moo. 478, S. C.; *Harris* v. *Packer*, 3 Tyrw. 370; *Smith* v. *Bellamy*, 2 Stark. 223. Before the act, the holder must have presented there, and could present no where else. Now, he *may* present effectually there; but, as was supposed, until the decision in *Gibb* v. *Mather*, may also present to the acceptor himself.

(*p*) *Saunderson* v. *Bowes*, 14 East, 500; *Howe* v. *Bowse*, 16 East, 112; *Rowe* v. *Young*, 2 B. & B. 165; *Williams* v. *Waring*, 10 B. & C. 2; *Emblin* v. *Dartnell*, 12 M. & W. 830; *Spindler* v. *Grellett*, 17 L. J., Exch. 6; 1 Exch. 384, S. C.; but see *Nichols* v. *Bowes*, 2 Camp. 498.

(*q*) *Vanderdonckt* v. *Thellusson*, 19 L. J., C. P. 13; 8 C. B. 812, S. C.

(*r*) *Price* v. *Mitchell*, 4 Camp. 200; *Williams* v. *Waring*, 10 B. & C. 2; 5 M. & R. 9, S. C. But in a case where the body of the note was printed, except the sum, the names of the parties, and the date, and the memorandum of the place at which the note was payable, was also printed, Lord Ellenborough held a special presentment there necessary. *Trecothick* v. *Edwin*, 1 Stark. 468; *sed quære*. The memorandum is no part of the note, though it be preceded by the words "payable at." *Masters* v.

that the note was made payable there, has even been held a fatal misdescription (*s*).

Consequence of not duly presenting.

The consequence of not duly presenting a bill or note is that all the antecedent parties are discharged from their liability, whether on the instrument, or on the consideration for which it was given.

Presentment not necessary to charge acceptor.

The acceptor or maker, however, still continues liable. And, indeed, presentment is not in general necessary for the purpose of charging him ; the action itself being held to be a sufficient demand, and that though the instrument be made payable on demand (*t*). But if a bill or note be payable ~~at or~~ after sight, it must be presented in order to charge the acceptor or maker (*u*). So must *a note* payable at a particular place, as we have just seen (*x*). But though the absence of demand be in general no defence, yet if the acceptor or maker pays on action brought without any previous demand, it seems the Court would, where they have the power, take the question of costs into consideration (*y*).

NEGLECT TO PRESENT, WHEN EXCUSED.

There are circumstances, however, which will excuse the neglect to present for payment (*z*).

Where bill or note seized under an extent.

Where a bill is seized under an extent, the indorsers are not discharged by non-presentment, for laches is not imputable to the Crown (*a*).

When neglect to present excused by circulating.

Neglect of presenting for payment is, as we have seen, excused in the case of a bank note payable on demand, and perhaps of other paper meant for circulation, if the holder,

Barretto, 19 L. J., C. P. 50; 8 C. B. 433, S. C.

(*s*) *Exon* v. *Russell*, 4 M. & Sel. 505.

(*t*) *Rumball* v. *Ball*, 10 Mod. 38; *Frampton* v. *Coulson*, 1 Wils. 33; *Norton* v. *Ellam*, 2 M. & W. 461.

(*u*) *Dixon* v. *Nuttall*, 1 C., M. & R. 307; 6 C. & P. 320, S. C.

(*x*) *Rhodes* v. *Gent*, 5 B. & Al. 244. *Quære*, as to the effect of non-presentment of a bill at a particular place, if the drawee had lodged money there and lost it by the holder's delay.

(*y*) *M'Intosh* v. *Haydon*, 1 R. & M. 362.

(*z*) An impossibility to present a bill for payment on the day it falls due, where the holder is in no fault, may render a subsequent presentment sufficient to charge the drawer; *aliter* of negligence or oversight in the Post Office, by which a bill miscarries, so that it cannot be presented till after it is due. The fact that a bill is lost is an excuse for delay in making demand, but for no more than a reasonable delay. See Byles on Bills, 5th American edition, p. 346.

(*a*) West on Extents, 29, 30.

CHAPTER XIV.

within the period at which he should have presented it, puts it into circulation (*b*).

By the absconding of the drawee.

If the acceptor or maker abscond, and his house be shut up, the bill or note may be treated as dishonoured ; but not if he have merely removed (*c*). If the drawee cannot be found, it will be sufficient to plead that fact, without averring that due search was made for him (*d*). Under an allegation that the bill was presented, evidence that the drawee could not be found is inadmissible (*e*).

By absence of effects in the drawee's hands.

Absence of effects in the drawee's hands will, as against the drawer, dispense with the necessity of presenting for payment (*f*), but not as against a subsequent indorser (*g*).

Not by declaration of acceptor that he will not pay.

A declaration by the acceptor, before a bill is due, that he will not pay, though made in the drawer's presence, does not dispense with presentment to the acceptor and notice to the drawer (*h*).

By returning notes.

It has been held, that neglect to present bankers' cash notes, the banker having failed, will be excused by returning them in due time (*i*).

Advantage from such neglect, how waived.

Advantage from such neglect is waived by any antecedent party who subsequently, *with notice of the laches*, promises

(*b*) *Camidge* v. *Allenby*, 6 B. & C. 373; 9 Dowl. & R. 391, S. C.

(*c*) *Anon.*, 1 Ld. Raym. 743; *Hardy* v. *Woodroofe*, 2 Stark. 319; *Hine* v. *Allely*, 4 B. & Ad. 624; 1 N. & M. 433, S. C.; *Collins* v. *Butler*, 2 Stra. 1087. See also *Sands* v. *Clarke*, 19 L. J., C. P. 84; 8 C. B. 751, S. C.

Where the maker of a note is a seaman without a domicil in the State, who goes a voyage about the time the note falls due, no demand on him is necessary to charge the indorser. Absence of the maker of a note on a voyage at sea, his family still residing in the State, will not excuse a demand of payment so as to discharge an indorser. See Byles on Bills, 5th American edition, p. 346.

(*d*) *Starke* v. *Cheeseman*, Carthew, 509; 1 Ld. Raym. 538, S. C.

(*e*) *Leeson* v. *Piggott*, 1788; Bayley, 6th ed. 409; and see *Smith* v. *Bellamy*, 2 Stark. 223; *Burgh* v. *Legge*, 5 M. & W. 421.

(*f*) *Terry* v. *Parker*, 1 Nev. & Perry, 752; 6 Ad. & E. 502, S. C. See *Prideaux* v. *Collier*, 2 Stark. 57; *Hill* v. *Heap*, D. & R., N. P. C. 57; *De Berdt* v. *Atkinson*, 2 H. Bl. 336. But see the observations on this last case in *Sands* v. *Clarke*, 19 L. J., C. P. 87; 8 C. B. 751, S. C.; and *Maltass* v. *Siddle*, 28 L. J., C. P. 258; 6 C. B. (N. S.) 494, S. C.; *Ex parte Bignold*, 1 Deacon, 728; 2 Mont. & Ayr. 633, S. C.

(*g*) *Saul* v. *Jones*, 28 L. J., Q. B. 37; 1 E. & E. 59, S. C.

(*h*) *Ex parte Bignold*, 1 Deac. 728; 2 Mont. & Ayr. 633, S. C.

(*i*) *Henderson* v. *Appleton*, Chit. 10th ed. 246; *Rogers* v. *Langford*, 1 C. & M. 637; *Robson* v. *Oliver*, 10 Q. B. 704. See ante.

to pay the bill, or makes, or promises to make, a partial payment on account of it (*k*).

Pleading.

As to the proper mode of pleading, where the plaintiff relies on any dispensation with presentment, see the Chapter on PLEADING.

Evidence of presentment.

The defendant's part payment or promise to pay, made after the bill or note is due, is *primâ facie* evidence of presentment (*l*).

(*k*) *Vaughan* v. *Fuller*, 2 Stra. 1246; *Hopley* v. *Dufresne*, 15 East, 275; *Haddock* v. *Bury*, 7 East, 236; *Hodge* v. *Fillis*, 3 Camp. 463. See *Goodall* v. *Dolly*, 1 T. R. 712; *Anson* v. *Bailey*, B. N. P. 276.

(*l*) *Croxon* v. *Worthen*, 5 M. & W. 5; *Lundie* v. *Robertson*, 7 East, 232; *Campbell* v. *Webster*, 15 L. J., C. P. 4; 2 C. B. 258, S. C.; *Greenway* v. *Hindley*, 4 Camp. 52.

CHAPTER XV.

OF PAYMENT.

TO WHOM IT SHOULD BE MADE 218
To a wrongful Holder of Instruments payable to Bearer 219
Of Instruments not payable to Bearer 220
Effect of Payment by Acceptor 220
By Drawer 220
Meaning of the Word "RETIRE" 222
By a Stranger 222
By one, who is both Agent for the Acceptor and also Indorser 222
When to be made . . . 222
At what Time of Day . 222
Subsequent Tender . . 223
Premature Payment . . 223
After Action brought. . 224
Payment by Bankers' Notes or Checks 224
What amounts to Payment 224
Legacy 224
Appropriation of Payments 225
Rateable Appropriation . 227
Part Payment 227
When Payment will be presumed 228
Evidence of Payment . 228
Of Delivering up the Bill . 228
Of giving a Receipt . . 228
Effect of Receipt . . 229
Tender of Part-payment . 229
Plea of Payment . . 229
Retractation of Payment . 230
Payment under Mistake of Fact or Law 230
When Payment is deemed complete 230

CHAPTER XV.

TO WHOM IT SHOULD BE MADE.

PAYMENT should be made to the true holder of the bill (*a*); for payment to any other party is no discharge to the acceptor; unless, indeed, the money paid finds its way into the holder's hands, and the holder has treated is as received in liquidation of the bill. A. drew a bill upon defendant, which defendant accepted; A. then indorsed it to the plaintiffs, his bankers, who entered it to the credit of plaintiffs' account, and, at maturity, presented it to the defendant for payment, and it was dishonoured. The plaintiffs then debited A. with the amount, but did not return him the bill. A few days afterwards defendant paid the amount to A.; A. still continued his banking account with the plaintiffs, and, at different times, paid in more money than was sufficient to cover the amount of the bill, and all the preceding items which stood above it in the account,

(*a*) See the definition of the word *holder*, ante, Chapter I.

though there was always a balance against him larger than the amount of the bill. A. failed, and the plaintiffs proved for the whole of their balance under his commission. They then brought this action on the bill against the defendant, the acceptor. Best, C. J.: "The payment to A. would not of itself have discharged the defendant, the plaintiffs having been at that time the holders, and entitled to the amount of the bill; but the ground on which the defendant is discharged is, that the plaintiffs not only entered the bill to the credit of A., but treated it as having been paid" (*b*).

Effect of payment to a wrongful holder of instruments payable to bearer.

There are some cases in which payment to a wrongful holder is protected, and others in which it is not (*c*). If a bill or note, payable to bearer, either originally made so, or become so by an indorsement in blank, be lost or stolen, we have seen that a *bonâ fide* holder may compel payment. Not only is the payment to a *bonâ fide* holder protected, but payment to the thief or finder himself will discharge the maker or acceptor (*d*), provided such payment were not made with knowledge or suspicion of the infirmity of the holder's title, or under circumstances which might reasonably awaken the suspicions of a prudent man (*e*). "For it is a general rule, that where one of two innocent persons must suffer from the acts of a third, he who has enabled such third person to occasion the loss must sustain it" (*f*). And supposing the equity of the loser and payer precisely equal, there is no reason why the law should interpose to shift the injury from one innocent man upon another. But, if such a payment be made under suspicious circumstances, or without reasonable caution, or out of the usual course of business, it will not as between all parties and for all purposes discharge the payer (*g*). Payment before the bill or note is

(*b*) *Field* v. *Carr*, 5 Bing. 13; 2 Moo. & P. 46, S. C. Where money is paid into a bank on the joint account of persons not partners in trade, the bankers are not discharged by payment of the check of one of those persons, drawn without the authority of the others; *Innes* v. *Stephenson*, 1 Moo. & Rob. 145; *Stone* v. *Marsh*, R. & M. 369; unless one alone afterwards becomes entitled to receive it. *Stewart* v. *Lee*, Mood. & M. 160; see ante.

(*c*) As to payment of a forged bill, see post, the Chapter on FORGERY OF BILLS.

(*d*) *Smith* v. *Sheppard*, Sel. Ca. 243; MS. of Mr. Serjeant Bond, Chitty, 10th ed. 180.

(*e*) We have seen that nothing short of fraud will affect the title of a transferee for value.

(*f*) *Lickbarrow* v. *Mason*, 2 T. R. 70.

(*g*) There is at present no decided case establishing that a party honestly paying is in as good a situation as a party honestly discounting. See, however, the observations of Best, C. J., in *Snow* v. *Peacock*, 2 C. & P. 221, and the observations of Parke, B., in *Robarts* v. *Tucker*, 16 Q. B. 575.

CHAPTER XV.

due, or long after it is due, or, in case of a check, long after it is drawn, or when the marks of cancellation are on the instrument, are examples of payment out of the usual course of business.

And, therefore, though a check be really drawn by a banker's customer, but torn in pieces before circulation by the drawer, with intention of destroying it, and a stranger, picking up the pieces, pastes them together, and presents the check soiled and so joined together to the banker, and he pays it, the banker cannot charge his customer with this payment, for the instrument was cancelled, and carried with it reasonable notice that it had been cancelled (*h*).

Of instruments not payable to bearer.

If the bill or note be not payable to bearer, but transferable by indorsement only, and be paid to a party whose title is made through the forged indorsement, the payer is not discharged (*i*).

Payment by acceptor.

A bill is not discharged, and finally extinguished, until paid by or on behalf of the acceptor; nor a note until paid by or on behalf of the maker.

Payment by drawer.

It was long an unsettled question, whether payment in part or in full by the drawer to the holder will discharge the acceptor *pro tanto*, or whether the holder may, nevertheless, recover the whole amount from the acceptor, and hold an equivalent to the amount received from the drawer, as money received of the acceptor to the drawer's use (*k*). It has been

The question as to the validity of a payment usually arises between a customer and his banker. But a banker paying a bill made payable at his bank must, it is conceived, exercise due caution.

(*h*) *Scholey* v. *Ramsbottom*, 2 Camp. 485.

(*i*) It has been contended, that each indorsement is a warranty of the validity of the prior indorsements, and that an indorser, who has been paid by the acceptor, is liable, if the indorsements to him turn out invalid, to be sued by the acceptor on an implied undertaking that he, as holder, was entitled to receive the amount of the bill. *East India Company* v. *Tritton*, 3 B. & C. 280; 5 Dowl. & R. 214, S. C.; *Smith* v. *Mercer*, 6 Taunt. 76; 1 Marsh, 453, S. C. L'endosseur est garant solidaire avec les autres signataires de la vérité de la lettre ainsi que du paiement à l'échéance. Pardessus, 376. Tous ceux qui ont signé, accepté, ou endossé une lettre de change, sont tenus à la garantie solidaire envers le porteur. Code de Commerce, 140; *Lovell* v. *Martin*, 4 Taunt. 799. See *McGregor* v. *Rhodes*, 25 L. J., Q. B. 318; 6 E. & B. 266, S. C.; *Robarts* v. *Tucker*, 16 Q. B. 575.

(*k*) In *Johnson* v. *Kennion*, 2 Wils. 262, recognized in *Walwyn* v. *St. Quintin*, 1 B. & P. 658, it was held, that the holder was entitled to recover the whole amount; but in *Bacon* v. *Searles*, 1 H. Bl. 88, it was considered that he could recover only the difference, and the report of the case of *Johnson* v.

thought that the holder can only recover of the acceptor the amount of the bill minus the sum paid by the drawer (*l*). The acceptor being the principal, and the drawer the surety, it might seem that a payment by the drawer discharges the acceptor's liability to the holder *pro tanto*, and makes the acceptor liable to the drawer for money paid to his use, and that if the drawer pay the whole bill, nominal damages only can be recovered by the holder of the acceptor (*m*). The better opinion, however, seems to be, that to an action against the acceptor, payment by the drawer is no plea, but only converts the holder into a trustee for the drawer when the holder afterwards recovers of the acceptor (*n*). But payment by the drawer of an *accommodation* bill is a complete discharge of the bill (*o*).

Kennion, was reflected on. See *Pierson* v. *Dunlop*, Cowp. 571. *Reid* v. *Furnival*, 1 C. & Mees. 538; 5 C. & P. 499, S. C.; *Browne* v. *Rivers*, Doug. 445. To the doctrine that a payment by a subsequent party operates as a satisfaction of the bill to the amount of the payment, it may be objected, that if the bill be satisfied, the party making the payment can maintain no action *on the bill* against a prior party, but must sue such prior party for money paid to his use. Whereas it is the constant practice for an intermediate party, who has paid the bill, to sue prior parties *on the bill*. See *Callow* v. *Laurence*, supra. The answer to this objection might have been, that such a payment is as to the rights and liabilities of parties, subsequent to the party paying, a satisfaction, but as to the rights and liabilities of prior parties, it may, at the election of the party paying, merely operate to place him in the position of a party to whom a negotiable instrument is assigned a second time.

(*l*) Lord Abinger appears to have so ruled at *nisi prius*. *Hemming* v. *Brook*, 1 Car. & M. 57.

(*m*) Mais comme ces différents débiteurs sont débiteurs envers lui de la même chose, le paiement qui lui est fait par l'un d'eux libère d'autant envers lui les autres. Poth. 106; see *Hemming* v. *Brook*, 1 Car. & M. 57.

(*n*) *Jones* v. *Broadhurst*, 9 C. B. 173; *Randall* v. *Moon*, 12 C. B. 261; but see *Williams* v. *James*, 19 L. J., Q. B. 445; 15 Q. B. 498, S. C.; *Jewell* v. *Parr*, 13 C. B. 909; 16 C. B. 684; *Kemp* v. *Balls*, 10 Exch. 607; *Belshaw* v. *Bush*, 11 C. B. 191; *James* v. *Isaacs*, 12 C. B. 791. In an action by indorsee against acceptor, where the consideration for the acceptance had failed, except as to an ascertained amount, for which there was a set-off, and the drawer had paid the indorsee in full, an equitable plea stating these facts was held good. *Agra and Masterman* v. *Leighton*, L. R., 2 Ex. 56; 36 L. T. 33, S. C.

(*o*) *Lazarus* v. *Cowie*, 3 Q. B. 459. Of bills not strictly accommodation bills. *Cook* v. *Lister*, 32 L. J., C. P. 121. Mr. Justice Willes has expressed an opinion that payment or satisfaction by a stranger is primâ facie good, and that the assent of the debtor will be presumed. That very learned judge refers to the rule of the civil law, "Debitorem ignarum seu etiam *invitum* solvendo liberare possumus." See the observations of Willes, J., in *Cook* v. *Lister*, 32 L. J., C. P. 126, and in *Manchester Warehouse Company* v. *Bertie*, C. P., T. T. 1866.

But this is
a (by Walter v. James
Law Rep: 6 Exch 124

CHAPTER XV.

Meaning of the word "retire."

The verb "*retire*" in its application to bills of exchange is an ambiguous word. In its ordinary sense it is used of an indorser who takes up a bill by handing the amount to a transferee, after which the indorser holds the instrument with all his remedies intact. But it is sometimes used of an acceptor, by whom when a bill is taken up or retired at maturity it is in effect paid, and all the remedies on it extinguished (*p*).

By a stranger.

Payment by a stranger of the amount of a bill to the bankers, at whose house the bill is made payable by the acceptor, the party paying obtaining possession of the bill, is not a payment by the acceptor (*q*).

By one, who is both indorser and agent for the acceptor.

If a banker at whose house a bill is made payable happen also to be indorser of the bill, and on the bill being brought to him when it becomes due he takes it up without observation, it is a question of fact for a jury whether he paid it as agent of the acceptor or merely retired it as indorser (*r*).

When to be made.

The acceptor of a bill, whether inland or foreign, or the maker of a note, should pay (*s*) it on a demand made, at any time within business hours, on the day it falls due. And, if it be not paid on such demand, the holder may instantly treat it as dishonoured (*t*).

At what time of day.

But the acceptor has the whole of that day within which to make payment; and though he should, in the course of that day, refuse payment, which refusal entitles the holder to give notice of dishonour, yet if he subsequently, on the

(*p*) *Elsam* v. *Denny*, 15 C. B. 87.

(*q*) *Deacon* v. *Stodhart*, 2 Man. & Gr. 317. As to payment by a stranger, see *Jones* v. *Broadhurst*, supra; *Simpson* v. *Egginton*, 10 Exch. 845; 24 L. J., Exch. 312, S. C.; *Kemp* v. *Balls*, 10 Exch. 607.

(*r*) *Pollard* v. *Ogden*, 2 E. & B. 459.

(*s*) If a banker who has funds in his hands refuse to pay a check, he thereby subjects himself to an action at the suit of his customer, the drawer. *Marzetti* v. *Williams*, 1 B. & Ad. 415; 1 Tyr. 77, S. C.; *Rolin* v. *Steward*, 14 C. B. 595, ante, 19, note (*w*); *Cumming* v. *Shand*, 29 L. J., Exch. 129. So, if he refuse to pay a bill of his customer, made payable at the banking house; but in order to charge the banker, the presentment must be within banking hours. *Whitaker* v. *The Bank of England*, 1 C., M. & R. 744; 6 C. & P. 700; 1 Gale, 54, S. C. See the Chapter on PRESENTMENT FOR PAYMENT.

(*t*) *Ex parte Moline*, 1 Rose, 303; *Burbidge* v. *Manners*, 3 Camp. 193; *Leftley* v. *Mills*, 4 T. R. 170; *Haynes* v. *Birks*, 3 B. & P. 599.

same day, makes payment, the payment is good, and the notice of dishonour becomes of no avail (*u*).

Subsequent tender.

A plea of tender (*x*), by the acceptor after the day of payment, is insufficient (*y*).

Before due.

If a bill or note be paid before it is due, and is afterwards indorsed over, it is a valid security in the hands of a *bonâ fide* indorsee. "I agree," says Lord Ellenborough, "that a bill paid at maturity cannot be re-issued, and that no action can be afterwards maintained upon it, by a subsequent indorsee. A payment before it becomes due, however, I think, does not extinguish it any more than if it were merely discounted. A contrary doctrine would add a new clog to the circulation of bills and notes; for it would be impossible to know whether there had not been an anticipated payment of them" (*z*).

If an acceptor discounts his own acceptance, he may transfer it, and the indorsee will be liable to a subsequent holder, even with notice (*a*). But if the acceptor is the holder when the bill falls due, it is extinguished (*b*).

If the holder constitutes any one of the parties liable to him his executor, and die, the appointment is equivalent to payment and a release (*c*). A premature release will not, any more than a premature payment, protect the releasee from liability to a subsequent holder without notice (*d*).

But the payment of a note payable on demand will be a

(*u*) *Hartley* v. *Case*, 1 C. & P. 555; 4 B. & C. 339; 6 D. & R. 505, S. C.

(*x*) As to *payment* where there are nominal damages, see *Beaumont* v. *Greathead*, 2 C. B. 494.

(*y*) *Hume* v. *Peploe*, 8 East, 168. But a *drawer or indorser* is not bound to pay till notice and request; and, therefore, a plea of tender, after the bill became due, may be good, if pleaded by a drawer and indorser. And, as a drawer or indorser has a reasonable time to pay, he may, it should seem, plead a tender even after request, and of principal only, without interest. *Walker* v. *Barnes*, 5 Taunt. 240; 1 Marsh. 36, S. C.; *Sword* v. *Palmer*, 8 Taunt. 277; 2 Moo. 274; but see *Siggers* v. *Lewis*, 1 C., M. & R. 370; 4 Tyrw. 847; 2 Dowl. 681, S. C.; where a plea that the action was commenced before a reasonable time had elapsed for the defendant, the indorser, to pay the bill, was held ill.

(*z*) *Burbidge* v. *Manners*, 3 Camp. 193; *Morley* v. *Culverwell*, 7 M. & W. 174. See *Harmer* v. *Steele*, 4 Exch. 1; *Lazarus* v. *Cowie*, 3 Q. B. 459; *Jewell* v. *Parr*, 13 C. B. 909; *Attenborough* v. *Mackenzie*, 25 L. J., Exch. 244.

(*a*) *Attenborough* v. *Mackenzie*, 25 L. J., Exch. 244.

(*b*) Byles on Bills, 4th American edition, p. 236.

(*c*) *Freakley* v. *Fox*, 9 B. & C. 130; 4 M. & Ry. 18, S. C. See the law on this point more fully discussed in Chapter V., tit. EXECUTORS.

(*d*) *Dod* v. *Edwards*, 2 C. & P. 602.

CHAPTER XV.

defence, even against an indorsee for value without notice (*e*); for the statute, which imperatively prohibits the re-issuing of such a note, dispenses with notice.

After action brought.

A payment after action brought will not prevent the holder from proceeding for his costs (*f*).

Payment by bankers' notes and checks.

If the bill be paid, the payer has a right to insist on its being delivered up to him; but if it be not paid, the holder should keep it. Yet it has been held, that an agent is justified, by the usage of trade, in delivering it up on receiving a check, though that check is afterwards dishonoured (*g*). But the drawers or indorsers, in such a case, would be discharged, for they have a right to insist on the production of the bill, and to have it delivered up on payment by them (*h*). If the holder of a check receive bank notes instead of cash, and the banker fail, the drawer is discharged (*i*).

What amounts to payment.

A set-off does not amount to payment, unless it be mutually agreed that one demand shall be set off against the other. Such an agreement amounts to payment (*k*). And an agreement, even by one of several partners, with a debtor to the firm, that a separate debt due from the partner shall be set off against a joint debt due to the firm, binds the firm (*l*). Credit given to the holder of a bill by the party ultimately liable is tantamount to payment (*m*). Where a banker takes from a customer and his surety a promissory note, intended to secure a running balance, and makes advances on the faith of the note, it is not discharged by subsequent unappropriated repayments made by the customer to the banker, but still continues as a security for the existing balance (*n*).

Legacy.

There are many circumstances under which a legacy by a debtor to his creditor, of equal or greater amount than the debt, will be considered a satisfaction of the debt. But a

(*e*) *Bartrum* v. *Caddy*, 9 Ad. & E. 275; 1 Per. & Dav. 207, S. C.

(*f*) *Toms* v. *Powell*, 6 Esp. 40; 7 East, 536, S. C.

(*g*) *Russell* v. *Hankey*, 6 T. R. 12.

(*h*) *Powell* v. *Roche*, 6 Esp. 76; vide ante.

(*i*) *Vernon* v. *Bouverie*, 2 Show. 296. And see *Guardians of the Lichfield Union* v. *Green*, 1 H. & N. 884.

(*k*) *Callander* v. *Howard*, 19 L. J., C. P. 312; 10 C. B. 290, S. C.

(*l*) *Wallace* v. *Kelsall*, 7 M. & W. 264; see *Gordon* v. *Ellis*, 7 M. & G. 607; 2 C. B. 821, S. C.

(*m*) *Atkins* v. *Owen*, 4 Nev. & Man. 123; 2 Ad. & El. 35, S. C.; *Bell* v. *Buckley*, 11 Exch. 631.

(*n*) *Pease* v. *Hirst*, 10 B. & C. 122; 5 M. & Ry. 88, S. C.

legacy to the holder of a *negotiable* bill or note can never be considered as a satisfaction of the debt on that instrument. For a legacy is a satisfaction when it may be presumed to have been the intention of the testator that it should so operate; but that cannot be presumed, when, from the assignable nature of the debt, the testator could not tell whether or no the legatee was at the time of the bequest his creditor (*o*).

Appropriation of payments.

Where a man is indebted to another in several items, and makes a partial payment, it often becomes a question, important not only to the parties themselves, but to third persons, to which of the items the payment shall be imputed.

The rule of the Roman law, and therefore in general of Continental law, is, that a payment shall be appropriated, first, according to the intention of the debtor at the time of making it (*p*); but if that be unknown, then, secondly, at the election of the creditor (*q*), signified to the debtor at the time of receiving it (*r*). If the intention of neither be known, payment must then be appropriated according to the presumed intention of the debtor, and it will be presumed that he meant to discharge such debts as were most burdensome: as, a debt carrying interest, rather than one which carries none; a debt secured by a penalty, rather than one resting on a simple stipulation; a debt, on which he may be made a bankrupt, rather than one which will not subject him to such a liability. If all the debts are equal in degree, the payment must then be imputed to them according to their respective priority in the order of time (*s*). Such is the rule of the civil law, from which, in some particulars, the common law differs.

Wherever, according to the English law, the transactions between the two parties form one general account current,

(*o*) *Carr* v. *Eastabrook*, 3 Ves. 561.

(*p*) Quotiens quis debitor ex pluribus causis unum debitum solvit, est in arbitrio solventis dicere quod potius debitum voluerit solutum, et quod dixerit, id erit solutum. D. 46, 3, 1. Vide etiam Cod. 8, 43, 1.

(*q*) Quotiens vero non dicimus ad quod solutum sit, in arbitrio est accipientis cui potius debito acceptum ferat. D. 46, 3, 1. Cod. 8, 43, 1.

(*r*) Dum in re agenda (in re præsenti hoc est statim atque solutum est) hoc fiat; ut vel creditori liberum sit non accipere vel debitori non dare, si alio nomine exsolutum quis eorum velit: cæterum postea non permittitur. D. 46, 3, 1, 2, 3.

(*s*) D. 46, 3. If all the debts were equal and alike in every respect, the sum paid was applied to a rateable reduction of them all. A rateable appropriation is also sometimes made by the English law. See an example in *Favenc* v. *Bennett*, 11 East, 36. See further, post, 227.

CHAPTER XV.

or are treated by them as such, payments are to be imputed to debts in the order of time, and the balance is to be struck at the foot of the account (*t*). But, if an unappropriated payment be made on account of several distinct insulated debts, which cannot be considered in the light of a running account between the parties, the common law then differs from the civil law and gives the creditor a right of appropriating it at any time before action (*u*), as he pleases (*x*), provided a prior appropriation have not been communicated to the debtor.

An appropriation which would have the effect of paying one man's debt with another man's money will not be allowed (*y*). Nor can there be an appropriation which would deprive a debtor of a benefit, such as the taxation of costs (*z*). And it seems that an appropriation by the creditor, without the knowledge or consent of the debtor, will not of itself afford sufficient ground for raising against the debtor a new promise to pay (*a*).

A payment may be imputed to a demand for which the creditor could not recover at law (*b*). But where a payment is made by a debtor on account generally, the court will not refer it to a debt barred by the statute, if it can be attributed to any debt not so barred (*c*). The law will ascribe a payment to a legal debt, rather than to an illegal one (*d*). A party receiving money for the use of another from a third person, which is not properly a payment but a set-off,

(*t*) *Clayton's case*, 1 Meriv. 604; *Geake* v. *Jackson*, 86 L. J., C. P. 108.

(*u*) *Simson* v. *Ingham*, 2 B. & C. 65; 3 D. & Ry. 249; *Mills* v. *Fowkes*, 5 Bing. N. C. 455; 7 Scott, 444, S. C.

(*x*) *Clayton's case*, 1 Meriv. 604; *Bodenham* v. *Purchas*, 2 B. & Ald. 39; *Stoveld* v. *Eade*, 4 Bing. 12; 12 Moo. 370; *Field* v. *Carr*, 2 Moo. & P. 46; 5 Bing. 13; *Goddard* v. *Cox*, 2 Stra. 1194; *Bosanquet* v. *Wray*, 6 Taunt. 597; 2 Marsh, 319, S. C.; *Kirby* v. *Duke of Marlborough*, 2 M. & Sel. 18; *Plomer* v. *Long*, 1 Stark. 153; *Woodroffe* v. *Hayne*, 1 C. & P. 600; *Shaw* v. *Picton*, 4 B. & C. 715; 7 Dowl. & R. 201, S. C.; *Marsh* v. *Houlditch*, Chitty, 9th ed. 404; *Hammersley* v. *Knowlys*, 2 Esp. 666; *Birch* v. *Tebbutt*, 2 Stark. 74; *Marryatts* v. *White*, 2 Stark. 101; *Meggott* v. *Mills*, 1 Ld. Raym. 286; *Dawe* v. *Holdsworth*, Peake, 64; *Peters* v. *Anderson*, 5 Taunt. 596; *Wright* v. *Laing*, 3 B. & C. 165; 4 Dowl. & R. 783; *Gough* v. *Davis*, 4 Price, 200; *Strange* v. *Lee*, 3 East, 484; *Simpson* v. *Ingham*, 2 B. & C. 65; 3 Dowl. & R. 249; *Mills* v. *Fowkes*, 5 Bing. N. C. 455; 7 Scott, 444, S. C.

(*y*) *Thompson* v. *Brown*, 1 M. & M. 40.

(*z*) *James* v. *Child*, 2 Tyrwh. 735; 2 C. & J. 252, S. C.

(*a*) *Nash* v. *Hodgson*, 6 De G. M. & G. 474; 25 L. J., Chan. 186; 23 L. J., Chan. 780, S. C.

(*b*) *Crookshanks* v. *Rose*, 1 M. & R. 100; 5 C. & P. 19, S. C.

(*c*) *Nash* v. *Hodgson*, 6 De G. M. & G. 474; 25 L. J., Chan. 186; 23 L. J., Chan. 780, S. C.

(*d*) *Wright* v. *Laing*, 3 B. & C. 165; 4 Dowl. & R. 783.

cannot appropriate the money without the knowledge or consent of him for whom it has been received (*e*). It has been held, that a payment may be appropriated to a disputed debt, if it be really a good debt (*f*).

Rateable appropriation.

There are cases where a payment is appropriated by law to several debts proportionally.

Thus where a principal debtor has assigned his effects to a trustee for his creditors, a creditor who has a guarantee for part of his debt will be forced, even at law, to apply in discharge thereof a rateable part of any payment that he may receive from the trustee (*g*).

Part-payment.

Part-payment of the debt by the party liable is no discharge of the whole debt (*h*), but part-payment by a stranger may be (*i*). And it has been held, that where a promissory note is due and unpaid, so that not only the principal, but

(*e*) *Waller* v. *Lacy*, 1 M. & Gr. 54; 1 Scott, N. R. 186, S. C.

(*f*) *Williams* v. *Griffith*, 5 M. & W. 300.

(*g*) *Baldwell* v. *Lydall*, 7 Bing. 489; see *Raikes* v. *Todd*, 1 P. & D. 138; 8 Ad. & E. 846, S. C.; *Paley* v. *Field*, 12 Ves. Jun. 435. See other instances of rateable appropriation in *Faveno* v. *Bennett*, 11 East, 36; and *Perris* v. *Roberts*, 1 Vernon, 34; 2 Chan. Ca. 83, S. C.

The following rules as to appropriation of payment have been established in America:—

The debtor has the first right to direct the application of any payment he may make.

The rule that a debtor may apply payment as he pleases, applies only to voluntary payments, and not to those made by process of law.

If no appropriation be made by him, it then devolves upon the creditor to make it.

Yet the creditor must make such an application as the debtor could not reasonably or justly object to.

A debtor or creditor cannot appropriate a payment in such manner as to affect the relative liability or rights of sureties without their consent.

When a debtor makes payments without specifying the application, the creditor cannot apply them to debts not due, if there are other debts which are due.

If application be directed by neither, then the law will make the application according to equity.

It has been held that such application by the law shall be made as the debtor may be presumed to have done—in other words, as would be most for his interest at the time.

The law will make the application first to interest, and then to principal.

To the debt which is prior in date.

To that debt which is least secured.

To make an application of a payment the person paying must give directions before, or at the time of payment.

See the authorities in Byles on Bills, 5th American edition.

(*h*) *Fitch* v. *Sutton*, 5 East, 230. When a bill or note may be satisfaction. See post, Chap. XVI.

(*i*) *Welby* v. *Drake*, 1 C. & P. 557.

CHAPTER XV.

interest (at least to a nominal amount) is due also, the principal may be taken in satisfaction of the debt and damages (*k*).

When payment will be presumed.

As the lapse of twenty years (*l*) is sufficient to raise a presumption that a bond has been paid, so it has been held to be a good defence to an action on a promissory note payable on demand (*m*). But if during this period the plaintiff was an alien enemy, and payment to him would consequently have been illegal, such a presumption would not, it seems, arise (*n*).

Evidence of payment.

The production of a check drawn by the defendant on his banker, and indorsed by the plaintiff, is evidence of payment (*o*); but not if there have been several transactions between the parties, without evidence to connect the delivery of the check with the payment in question (*p*). A bill or note once in circulation overdue, and coming out of the hands of the acceptor or maker, is presumed to be paid. Thus, it is a maxim of the Scotch law, *chirographum apud debitorem repertum presumitur solutum*. But the mere production of a bill from the custody of the acceptor is not *primâ facie* evidence of his having paid it, without proof of its having been once in circulation after it had been accepted (*q*).

Of delivering up the bill.

The party paying a bill or note has a right to insist on its being delivered up to him (*r*). But, where the bill or note is not negotiable, he cannot refuse to pay it till it is delivered up (*s*).

(*k*) *Beaumont* v. *Greathead*, 3 D. & L. 631; 2 C. B. 494, S. C.

(*l*) See now 3 & 4 Will. 4, c. 42, s. 3.

(*m*) *Duffield* v. *Creed*, 5 Esp. 52.

(*n*) *Du Belaix* v. *Lord Waterpark*, 1 D. & R. 16.

(*o*) *Egg* v. *Barnett*, 3 Esp. 196.

(*p*) *Aubert* v. *Walsh*, 4 Taunt. 293.

(*q*) *Pfiel* v. *Vanbatenberg*, 2 Camp. 439.

In America it is held that if a bill be sent to the drawee and he be directed to pass it to the credit of the holder, and do so credit it, the bill is *funotus officio*, and cannot be further negotiated.

Where a promissory note that has been negotiated comes into the possession of one of the parties liable to pay it, such possession is *primâ facie* evidence of payment by him, and he is to be treated as the *bonâ fide* holder unless the contrary is made to appear.

The possession of a bill by the drawee after maturity is *primâ facie* evidence of payment. See Byles on Bills, 5th American ed. 364.

(*r*) *Hansard* v. *Robinson*, 7 B. & C. 90; 9 Dowl. & R. 860; *Powell* v. *Roach*, 6 Esp. 76; *Alexander* v. *Strong*, 9 M. & W. 733; *Cornes* v. *Taylor*, 10 Exch. 441.

(*s*) *Wain* v. *Bailey*, 10 A. & E. 616; 2 P. & D. 507, S. C.

Of giving a receipt.

It was formerly held (*t*), that a party paying a debt could not in general demand a receipt for the money, and therefore that a tender, on condition of having a receipt, was insufficient (*u*). It has since, however, been enacted, by 43 Geo. 3, c. 126, s. 5, that a person to whom money has been paid is bound to give a receipt, and that if he refuse to fill up a blank stamp paper presented to him for that purpose, and to pay the stamp, he becomes liable to a penalty of 10*l.* (*x*). It is usual to write a receipt on the back of bills, and it has been said that it is the duty of bankers to make some memorandum on bills or notes which have been paid (*y*). A receipt on a bill or note, duly stamped, does not require an additional stamp (*z*). And a receipt on a distinct piece of unstamped paper, though it cannot be looked at as evidence of the payment, may be shown to a witness who has signed it to refresh his memory, and enable him to speak to the fact of payment (*a*).

Effect of receipt.

A receipt on the back of a bill imports, *primâ facie*, that it has been paid by the acceptor (*b*).

Tender of part-payment.

A tender of part of the amount of an entire sum due on a bill or note seems not to be good *pro tanto* (*c*), even though the residue be met by a set-off (*d*).

Plea of payment.

A defendant, where there is a plea of payment (but not otherwise), is allowed to reduce the damages by the amount of payment established, though he be unable to prove the plea (*e*). But if he plead that a note was given for a part

(*t*) According to the older authorities, the obligor of a single bond is not bound to pay without an acquittance under seal; otherwise of a bond with condition. Bro. Ab. tit. Faits, pl. 8; 1 Vin. Ab. 192; Fortesc. 145.

(*u*) *Green* v. *Croft*, 2 H. Bl. 30; *Cole* v. *Blake*, Peake, N. P. C. 179.

(*x*) See 5 & 6 Vict. c. 82, same duty for Ireland.

(*y*) Per Ld. Ellenborough, *Burbidge* v. *Manners*, 3 Camp. 195.

(*z*) 55 Geo. 4, c. 184, Sched. Receipts. A receipt may be explained. *Graves* v. *Key*, 3 B. & Ad. 313.

(*a*) *Maugham* v. *Hubbard*, 8 B. & C. 14; 2 Man. & R. 5. Letters by the General Post, acknowledging the safe arrival of any bills of exchange, promissory notes, or any other securities for money, were formerly exempted from stamp duty by the 55 Geo. 3, c. 184, but now repealed by 17 & 18 Vict. c. 83, s. 13.

(*b*) *Pfiel* v. *Vanbatenberg*, 2 Camp. 439; *Scholey* v. *Walsby*, Peake, 25; *Graves* v. *Key*, supra.

(*c*) *Cotton* v. *Godwin*, 7 M. & W. 147; *Hesketh* v. *Fawcitt*, 11 M. & W. 356; *Dixon* v. *Clark*, 5 C. B. 935; *Searles* v. *Sadgrove*, 5 E. & B. 639.

(*d*) *Searles* v. *Sadgrove*, supra.

(*e*) It is said to have been doubted, whether, in an action on a bill or note, a plea of part-pay-

CHAPTER XV.

only of the apparent consideration, and allege payment of that part, and on issue joined the plea is found against him, the plaintiff is entitled to a verdict for the full amount of the note (*f*).

Retractation of payment.

If the drawee discover, after payment, that the bill or check is a forgery, he may in general, by giving notice on the same day, recover back the money (*g*). And if he have paid the bill with the understanding that he was to receive it back, and do not, he may bring an action to retract the payment (*h*). And an indorser may sue on a bill which he has been induced by fraud to pay on behalf of the party liable (*i*).

Payment under mistake of fact or law.

Money paid under a mistake of law cannot be recovered back (*k*); but money paid under a mistake of fact, or even in forgetfulness of a fact, may be recovered back (*l*).

When payment is deemed to be complete.

Money laid down on the counter by a banker's cashier in payment of a check cannot be recovered back by action, though it were handed over under a misapprehension of the state of the drawer's account; still less can it be taken back by force from the party receiving it (*m*). A banker's counter is in the nature of a neutral table, provided for the use of both banker and customer. As soon as the money is laid down by the banker upon the counter, to be taken up by the receiver, the payment is complete (*n*).

ment be good even *pro tanto*. *Lord* v. *Ferrand*, 13 L. J., Exch. 111. *Sed quære.*

(*f*) *Robins* v. *Lord Maidstone*, 4 Q. B. 811.

(*g*) See the Chapter on FORGED BILLS.

(*h*) *Alexander* v. *Strong*, 9 M. & W. 733. See also the Chapter on PLEADING.

(*i*) *Bell* v. *Buckley*, 11 Exch. 631.

(*k*) *Kitchen* v. *Hawkins*, Law Rep., 2 C. P. 22.

(*l*) *Kelly* v. *Solari*, 9 M. &. W. 54.

(*m*) *Chambers* v. *Miller*, 32 L. J., C. B. 30.

(*n*) Ibid.

CHAPTER XVI.

OF SATISFACTION, EXTINGUISHMENT AND SUSPENSION.

SATISFACTION . . . 231
Not necessary before Breach 231
Its Requisites . . . 232
Payment of a smaller Sum by third Party . . 232
Engagement by third Party 233
Relinquishing a Suit . . 233
When a Bill operates as Satisfaction . . . 233
EXTINGUISHMENT . . 234
Effect of Warrant of Attorney 234
Of Transfer to an Acceptor 234
OF JUDGMENT . . . 234
OF EXECUTION . . 234
Of Discharge from Execution 234
Of waiving a Fieri Facias . 235
Of taking a Deed . . 235
SUSPENSION . . . 235
Effect of Renewal . . 235
Of Debtor becoming Administrator . . . 236
Of Covenant not to sue within a limited Time . 236

CHAPTER XVI.

THE nature and effect of payment, in the ordinary sense of that word, has already been considered in the Chapter on PAYMENT. The nature and effect of such dealings with the acceptor, or other principal debtor as discharge the drawer or indorser, is a subject of so much importance, that it will form the subject of a separate Chapter on SURETYSHIP. In the present Chapter, the reader's attention is requested to such observations on satisfaction, extinguishment, and suspension, as do not properly fall within either of those two divisions.

SATISFACTION.

Not necessary before breach.

A simple contract may be discharged before breach, without a release and without satisfaction (*a*). But *after breach*, unless there be a release, there must be satisfaction (*b*). Accord without satisfaction is no plea, and no action lies on an accord (*c*).

(*a*) *Langden* v. *Stokes*, Cro. Car. 383; Com. Dig. Action on the Case in Assumpsit, G., *Conier and Holland's case*, 2 Leo. 214; *King* v. *Gillett*, 7 M. & W. 55; *Dobson* v. *Espie*, 26 L. J., Exch. 240; 2 H. & N. 79, S. C.

(*b*) As to the waiver of an acceptance or indorsement, see the Chapter on ACCEPTANCE.

(*c*) *Allen* v. *Harris*, 1 Ld. Raym. 122; *Lynn* v. *Bruce*, 2 H. Bl. 117. Unless another person is party to it. *Henderson* v. *Stobart*, 5 Exch. 99.

CHAPTER XVI.

Its requisites.

A satisfaction must be beneficial to the plaintiff (*d*). It has been considered that it must come from the defendant or at least from some one who represents him (*e*), but at this day probably satisfaction by a stranger would be held good (*f*).

Payment of a smaller sum by third party.

Payment by the debtor himself of a sum smaller than the debt is no satisfaction (*g*). But payment of a smaller sum by a third person has been held to be a discharge of the whole debt. The defendant was drawer of a bill for 18*l.* 3*s.* 11*d.*, and the plaintiff had taken from the defendant's father 9*l.* in satisfaction of the whole debt. The plaintiff, notwithstanding, afterwards sued the defendant for the balance. But Abbott, C. J., said, "if the father did pay the smaller sum in satisfaction of this debt, it is a bar to the plaintiff's now recovering against the son, because, by suing the son, he commits a fraud on the father, whom he induced to advance his money on the faith of such advance being a discharge of his son from further liability" (*h*). Payment of a smaller sum may be a satisfaction where that

(*d*) *Cumber* v. *Wane*, 1 Stra. 426; *Heathcote* v. *Crookshanks*, 2 T. R. 24.

(*e*) *Grymes* v. *Blofield*, Cro. Eliz. 541; *James* v. *Isaacs*, 12 C. B. 791; *Kemp* v. *Balls*, 10 Exch. 607; *Edgecombe* v. *Rodd*, 5 East, 294. The effect of satisfaction by a stranger was fully discussed in *Jones* v. *Broadhurst*, 9 C. B. 173; and see a very learned judgment delivered by Mr. Justice Maule in *Belshaw* v. *Bush*, 11 C. B. 207, to the effect that satisfaction by a stranger is good. See also Chapter XV. It must be fully executed. *James* v. *David*, 5 T. R. 141; Bac. Ab. 8; *Walker* v. *Seaborne*, 1 Taunt. 526. Mutual promises, with an immediate remedy on them have, however, been considered a good accord and satisfaction. See Com. Dig. Accord, B. 4; *Cartwright* v. *Cooke*, 3 B. & Ad. 701; *Good* v. *Cheesman*, 2 B. & Ad. 328; but see *Bayley* v. *Homan*, 3 Bing. N. C. 915; 5 Scott, 94, S. C. Is not the distinction this? If the mere agreement were intended to be the satisfaction, it need not be executed; if its performance were intended as the satisfaction, it must be executed. See *Reeves* v. *Hearn*, 1 M. & W. 323; *Sard* v. *Rhodes*, 1 M. & W. 153; *Lewis* v. *Lyster*, 2 C., M. & R. 707. In the Roman law, a stipulation by which a former obligation was taken away by the substitution of a new one was familiar. It was called Novatio. It exists at this day in the French law. (Code Civil, 1271.) Novation might be either without a change of persons, *sine delegatione*, or with a change of persons, *cum delegatione*. There might be a change of the debtor's person *expromissio*, or of the creditor's *cessio*.

(*f*) *Belshaw* v. *Bush*, ubi supra.

(*g*) *Fitch* v. *Sutton*, 5 East, 230; unless the demand be unliquidated. *Wilkinson* v. *Byers*, 1 Ad. & El. 106; 3 N. & M. 853, S. C.; *Watters* v. *Smith*, 2 B. & Ad. 889; *Beaumont* v. *Greathead*, 2 C. B. 494; *Cooper* v. *Parker*, 24 L. J., C. P. 68; 15 C. B. 822, S. C.

(*h*) *Welby* v. *Drake*, 1 Car. & Payne, 557; *Cooper* v. *Parker*, 15 C. B. 822.

smaller sum is the result of an account stated, including cross demands (*i*).

Engagement by third party.

So, although a contract by the defendant himself to pay a smaller sum can be no satisfaction, unless it be negotiable (*j*); yet a contract by a third person to do so may be. Thus the taking a bill from one of the two partners may operate as a satisfaction of the joint debt: for the sole liability of one person may, in some instances, be more advantageous than his liability jointly with another (*k*).

Relinquishing a suit.

Relinquishing a suit, involving a doubtful point of law, may be a good satisfaction (*l*). So, it should seem, is the relinquishment of a claim involving a reasonable doubt, though really unfounded and without suit (*m*).

When a bill operates as satisfaction.

The acceptance of a *negotiable* security from the debtor alone may be a satisfaction even of a debt of larger amount (*n*).

Where a bill or note, on which some person other than the debtor is liable, is expressly given and *accepted* (*o*), in ***full satisfaction and discharge***, the liability of the debtor for the original debt will not revive, on the dishonour of the substituted instrument (*p*). But if it be taken generally on account, or in renewal, the original liability of the debtor revives on its dishonour (*q*). If, in satisfaction of a note, a second note be given, and in satisfaction of the second note a third, the third note cannot be pleaded as given in satisfaction of the first (*r*).

The taking of a co-extensive security of a higher nature for a bill or note merges the remedy on the inferior instrument. But it must be strictly co-extensive. Therefore, a specialty given by one maker of a joint and *several* note does not merge the remedy on the note (*s*).

(*i*) *Smith* v. *Page*, 15 M. & W. 683; *Perry* v. *Atwood*, 25 L. J., Q. B. 408; 6 E. & B. 691, S. C.

(*j*) *Sibree* v. *Tripp*, 15 M. & W. 23.

(*k*) *Thompson* v. *Percival*, 5 B. & Ad. 925; 3 N. & M. 667, S. C.; *Henderson* v. *Stobart*, 5 Exch. 99; and see *Belshaw* v. *Bush*, 11 C. B. 191.

(*l*) *Longridge* v. *D'Orville*, 5 B. & Ald. 117. See *Edwards* v. *Baugh*, 11 M. & W. 641; *Llewellyn* v. *Llewellyn*, 15 L. J., Q. B. 4.

(*m*) *Cook* v. *Wright*, 30 L. J., Q. B. 321.

(*n*) *Sibree* v. *Tripp*, 15 M. & W. 23.

(*o*) *Hardman* v. *Bellhouse*, 9 M. & W. 596.

(*p*) *Sard* v. *Rhodes*, 1 M. & W. 153; 1 Tyrw. & Gr. 298; 4 Dowl. 743; 1 Gale, 376, S. C.

(*q*) See post, *Steadman* v. *Goock*, 1 Esp. 3; *Kearslake* v. *Morgan*, 5 T. R. 513.

(*r*) *David* v. *Preece*, 5 Q. B. 440.

(*s*) *Ansell* v. *Baker*, 15 Q. B.

CHAPTER XVI.

EXTINGUISHMENT OR MERGER.

Effect of warrant of attorney.

A warrant of attorney is not an extinguishment of the debt, as between the parties. "Till judgment is entered up," says Lord Ellenborough, "the warrant of attorney is merely a collateral security, and cannot merge the original debt" (*t*).

Of transfer to an acceptor.

A bill indorsed in blank to one of several acceptors, and in his hands *when due*, cannot be afterwards transferred (*u*), so as to confer on the transferee a remedy against any of the acceptors; for there has been that which is an equivalent to the performance of the contract.

OF JUDGMENT.

Judgment recovered on a bill or note is an extinguishment of the original debt, as between the plaintiff and the defendant. But it alone, without actual satisfaction, is no extinguishment, as between the plaintiff and other parties not jointly liable with the original defendant, whether those parties be prior or subsequent to the defendant (*x*). Nor is it an extinguishment, as between a party prior to the plaintiff, to whom the plaintiff after the judgment returns the bill, and the defendant (*y*).

But a judgment recovered against one of several *joint* makers or *joint* acceptors, though without satisfaction, is a good plea in bar to an action against the others (*z*). But a judgment recovered against one *joint* and *several* maker is no plea to an action against his companion (*a*).

OF EXECUTION.

Nor does the issuing of execution against the person or goods of one party to a bill extinguish the plaintiff's remedy against other parties.

Of discharge from execution.

Nay, even the discharging of one party from execution, under a *ca. sa.*, though it is a satisfaction as to him, and a discharge of those parties to the bill who are his sureties

30. *Quære*, as to the effect when the note is joint only. See *Bell* v. *Banks*, 3 M. & G. 258, 267; *King* v. *Hoare*, 13 M. & W. 494, 496; *Sharpe* v. *Gibbs*, Scott, N. R. See ante, Chapter on ACCEPTANCE.

(*t*) *Norris* v. *Aylett*, 2 Camp. 329; *Bell* v. *Banks*, 3 M. & G. 258.

(*u*) *Steele* v. *Harmer*, 15 L. J., Exch. 217; 14 M. & W. 831, S. C. As to this, see the judgment of the Court of Error, 19 L. J., Exch. 37; 4 Exch. 1, S. C.

(*x*) Bayley, 335; *Claxton* v. *Swift*, 2 Show. 441, 494; Lutwyche, 882; Skin. 255, S. C.

(*y*) *Tarleton* v. *Allhusen*, 2 Ad. & E. 32.

(*z*) *Ward* v. *Johnson*, 15 Syng's Amer. Rep. 148; *King* v. *Hoare*, 15 M. & W. 494.

(*a*) Ibid.

thereon (*b*), is no extinguishment of the liability of other parties (*c*).

Waiving a *fieri facias* against the goods of a party does not discharge any other party (*d*). Of waiving a *fieri facias*.

Taking security of a higher nature, as a deed, though it extinguish the simple contract debt on the bill, as between the parties to the substitution, has no effect on the liability of the other distinct parties to the bill (*e*), supposing that it does not give time so as to prejudice the condition of sureties. Indeed, if the specialty were given and accepted as a collateral security only, even the liability on the bill, of the party giving it, remains unaffected (*f*). Of taking a deed.

SUSPENSION.

If a bill or note be taken on account of a debt and nothing be said at the time, the legal effect of the transaction is this —that the original debt still remains, but the remedy for it is suspended till maturity of the instrument in the hands of the creditor (*g*). This effect of giving the bill has also been described as a conditional payment (*h*). It is an exception, but not a solitary one, to the general rule of law, that a right of action once suspended by act of the parties is gone for ever (*i*). The action for the original debt is equally suspended if the bill or note be given by a stranger (*k*), or if it be outstanding in the hands of a transferee.

Where a bill is renewed, holding the original bill, and taking the substituted one, operates as a suspension of the debt till the substituted bill is at maturity (*l*). And although the second bill for the principal sum should be paid, the Effect of renewal.

(*b*) See Chapter on INDULGENCE, post.

(*c*) *Hayling* v. *Mulhall*, 2 W. Bl. 1235, the marginal note of this case is incorrect, see *English* v. *Darley*, 2 Bos. & P. 61; 3 Esp. 49, S. C.; *Clark* v. *Clement*, 6 T. R. 525; *Mayhew* v. *Crickett*, 2 Swanst. 190. See *Michael* v. *Myers*, 6 M. & G. 702.

(*d*) *Pole* v. *Ford*, 2 Chit. 125.

(*e*) Bayley, 6th ed. 334; Bac. Ab. Extinguishment, D.; *Ansell* v. *Baker*, 15 Q. B. 20.

(*f*) *Bedford* v. *Deakin*, 2 B. & Ald. 210; 2 Stark. 178, S. C.

(*g*) *Kearslake* v. *Morgan*, 5 T. R. 513; 2 Wms. Saund. 108 b, n. c; *Steadman* v. *Goooh*, 1 Esp. 3.

(*h*) *Belshaw* v. *Bush*, 11 C. B. 205.

(*i*) *Belshaw* v. *Bush*, 11 C. B. 201. See ante. *Ford* v. *Beech*, Parke, B., delivering the judgment of the Court of Error, 11 Q. B. 867.

(*k*) Ibid.

(*l*) *Kendrick* v. *Lomax*, 2 C. & J. 405; 2 Tyrw. 438, S. C. See *Ex parte Barclay*, 7 Ves. 597; *Bishop* v. *Rowe*, 3 M. & Sel. 362; *Dillon* v. *Rimmer*, 1 Bing. 100; 7 Moore, 427, S. C.; *In re London and Birmingham Bank*, 34 L. J., Chan. 418.

CHAPTER XVI.

plaintiff may recover interest due on the original bill at the time when the second was given, by bringing an action on the original bill, unless it appear that the second bill was intended to operate as a renewal, or satisfaction of the whole of the former bill (*m*). If the second bill be discharged, by an alteration, an action may be brought on the first (*n*).

Of debtor becoming administrator.

If, as we have seen, a debtor on a bill takes out administration to his deceased creditor, that is a suspension of the right of action (*o*).

Covenant not to sue within a limited time.

A covenant not to sue for a limited time will not suspend the right of action (*p*), but will only create a right to sue for the breach of covenant. No more will a subsequent, or even a contemporaneous, but collateral, agreement on good consideration not to sue for a limited time on a bill or note (*q*).

(*m*) *Lumley* v. *Musgrave*, 4 Bing. N. C. 9; 5 Scott, 230, S. C.; *Lumley* v. *Hudson*, 4 Bing. N. C. 15; 5 Scott, 238, S. C.

(*n*) *Sloman* v. *Cox*, 1 C., M. & R. 471; 5 Tyrw. 174, S. C.

(*o*) Ante, p. 56. See *Lowe* v. *Peskett*, 16 C. B. 500.

(*p*) *Thimbleby* v. *Barron*, 3 M. & W. 210.

(*q*) *Ford* v. *Beech*, 11 Q. B. 842, in error; *Webb* v. *Spicer*, 19 L. J., Q. B. 35; 13 Q. B. 894, S. C., in error; *Moss* v. *Hall*, 5 Exch. 50; per Parke, B., *Salmon* v. *Webb*, 3 H. L. Cas. 510; *Flight* v. *Gray*, 3 C. B., N. S. 320.

CHAPTER XVII.

OF RELEASE.

What it is . . . 237
Release at Maturity . . 237
Premature Release . . . 237
By a Party who is not the Holder 237
To Drawee before Acceptance 238
By or to one of several jointly entitled or liable . 238
Restrained by a Recital . 238
Covenant not to sue . . 238
Covenant not to sue for a limited Time . . . 238
Appointment of Debtor Executor 239
Right to hold Securities for released Debt . . 239

CHAPTER XVII.

What it is.

An express release, *relaxatio*, is an acquittance under the seal of the releasor. Being a deed, no consideration is essential to its validity (*a*).

Release at maturity.

A release by the holder after the maturity of the bill, is a complete discharge as between the releasor and his transferees on the one hand, and the releasee on the other. Its effect on other parties will be considered when we come to the subject of principal and surety.

Premature release.

But a premature release, *i. e.*, a release before the bill is due, though good as between the parties, will not discharge the releasee from the claim of an indorsee for value, who took the bill before it was due, without notice of the release (*b*).

By a party who is not the holder.

And a release, whether before or after the maturity of the bill, is good *as between the parties*, although the releasor be not at the time of the release the holder of the bill (*c*).

(*a*) As to the discharge of contract before breach, see the preceding Chapter.

(*b*) *Dod* v. *Edwards*, 2 C. & P. 602.

(*c*) *Scott* v. *Lifford*, 1 Camp. 246; 9 East, 347, S. C. If an acceptor plead a release it must appear by his plea that the bill had been accepted before the release was given. *Ashton* v. *Freestun*, 2 M. & G. 1; 2 Scott, N. R. 273, S. C.

CHAPTER XVII.

To drawee before acceptance.

But a release of a drawee before acceptance is inoperative (*d*).

By or to one of several jointly entitled or liable.

A release *by* one of several joint creditors is a release by all. And a release *to* one of several joint contractors is in law a release of all (*e*). Therefore a release of one of two joint acceptors or joint indorsers is a release to both.

A release of one of several joint debtors, who are *severally*, as well as *jointly*, liable, is equally a release to all, for judgment and execution against one would have been a discharge to all (*f*).

But it has been held, that a release to parties jointly liable may in some cases be restrained by the terms of the instrument (*g*), and may be construed as a covenant not to sue where such a construction is necessary to carry out the paramount intention of the deed (*h*). But it cannot be defeated by a mere parol agreement (*i*).

Restrained by a recital.

Indeed, the most general and sweeping words of release may be qualified and restrained by the recital (*j*).

Covenant not to sue.

A covenant not to sue amounts in law to a release. But though it may be pleaded as a release by the party to whom it is given, it does not so far operate as to discharge another person jointly liable (*k*). Nor will a covenant not to sue, given by one of two joint creditors, operate as a release (*l*).

Covenant not to sue for a limited time.

A covenant not to sue for a limited time, though (as we shall hereafter see) it discharges sureties, does not, *as be-*

(*d*) *Drage* v. *Netter*, 1 Ld. Raym. 65; *Hartley* v. *Manton*, 5 Q. B. 247; and see *Ashton* v. *Freestun*, ante, n. (*o*), p. 237.

(*e*) Co. Litt. 232, *a*; *Nicholson* v. *Revill*, 4 Ad. & Ell. 675; 6 N. & M. 192; 1 Har. & W. 753, S. C. So a release of one of several joint trespassers is a release of all; Lit. s. 376.

(*f*) *Nicholson* v. *Revill*, 4 Ad. & E. 675; 6 N. & M. 192; 1 Har. & W. 753, S. C.; *Evans* v. *Thomridge*, 2 K. & J. 174; 25 L. J., Ch. 102, S. C.

(*g*) *Brooks* v. *Stuart*, 1 Per. & D. 615; 9 Ad. & E. 854, S. C.; *Cocks* v. *Nash*, 9 Bing. 341; *Price* v. *Barker*, 4 E. & B. 460; *Henderson* v. *Stobart*, 5 Exch. 99.

(*h*) *Solly* v. *Forbes*, 2 B. & B. 38; *Willis* v. *De Castro*, 27 L. J., C. P. 243; 4 C. B. (N. S.) 216, S. C.

(*i*) 2 Rol. Ab. 412; *Lacy* v. *Kynaston*, 2 Salk. 575; 2 Saund. 47, *t*; *Cheetham* v. *Ward*, 1 B. & P. 630; *Nicholson* v. *Revill*, nbi supra, n. (*e*); *Brooks* v. *Stuart*, 9 Ad. & E. 854; 1 Per. & D. 615, S. C.

(*j*) *Payler* v. *Homersham*, 4 M. & S. 423; *Simons* v. *Johnson*, 3 B. & Ad. 175.

(*k*) *Dean* v. *Newhall*, 8 T. R. 168; *Hutton* v. *Eyre*, 6 Taunt. 289; *Price* v. *Barker*, 4 E. & B. 760.

(*l*) *Walmesley* v. *Cooper*, 11 Ad. & Ell. 216; 3 Per. & Day. 142, S. C.

tween the parties, effect a release, or even a suspension of the action (*m*), unless there be a provision that it may be pleaded in bar (*n*).

Appointment of debtor executor.

We have already seen (*o*) that the creditor's appointment of his debtor as executor amounts in law to a release. And that the same consequence follows if one of several joint debtors be appointed executor. But a debtor's appointment of his creditor to be executor is no release unless there be assets (*p*).

Right to hold securities for released debt.

The release of a debt is a release of the right to hold any securities that may have been given for the debt (*q*).

(*m*) *Thimbleby* v. *Barron*, 3 M. & W. 210.

(*n*) *Walker* v. *Neville*, 34 L. J., 73, Exch.

(*o*) Ante, p. 54.

(*p*) See *Lowe* v. *Peskett*, 16 C. B. 500.

(*q*) *Cowper* v. *Green*, 7 M. & W. 633.

CHAPTER XVIII.

OF THE LAW OF PRINCIPAL AND SURETY IN ITS APPLICATION TO BILLS AND NOTES.

General Principles of the Law 240
Division of the Subject . 241
WHAT PARTIES TO A BILL, ARE PRINCIPALS, AND WHAT PARTIES ARE SURETIES . . . 242
On Accommodation Bills . 243
On Promissory Notes . 243
On a Joint and Several Note 244
WHAT CONDUCT OF THE CREDITOR DOES OR DOES NOT DISCHARGE THE SURETY . . 244
Receipt of Payment . . 246
Release 246
Covenant not to sue . . 246
Release in Law . . 247
Agreement not to sue . . 247
Renewing a Bill . . 247
Misusing Securities . . 247
Discharge from Execution . 247
Part-payment . . . 248
Offer to give Time . . 248
Cognovit, or Warrant of Attorney . . . 248
Judgment 249
Bankruptcy . . . 249
Insolvency . . . 249
Compounding . . . 249
Collateral Security . . 249
Warrant of Attorney . 250
Discharge of prior Parties by giving time to Drawee who has not accepted . 250
HOW THE DISCHARGE OF THE SURETY MAY BE PREVENTED . . . 251
HOW IT IS WAIVED . . 252
WHAT CONDUCT OF THE CREDITOR TOWARDS THE SURETY WILL DISCHARGE THE PRINCIPAL 252
RIGHT OF SURETIES . 252
Surety's Right to Indemnity 252
Of Contribution between Co-Sureties 253
Action for Contribution between Co-Sureties . . 253

CHAPTER XVIII.

General principles of the law.

OUR law of principal and surety is in substance the same as the Roman law: not perhaps so much derived from it, as flowing from the same natural equities between creditor, principal debtor, and sureties. "Pro eo qui promittit solent alii obligari, qui fidejussores appellantur; quos homines accipere solent dum curant ut diligentius sibi cautum sit" (*a*).

A party liable on a bill sometimes bears to the holder the relation of principal debtor, sometimes of surety only.

(*a*) Inst. 3, 20. See as to the Roman, Dutch law, and the old French law, *M'Donald* v. *Bell*, 3 Moore, P. C. C. 315; *Bellingham* v. *Frere*, 1 Moore, P. C. C. 333.

The contract of suretyship is a contract *uberrimæ fidei*. Therefore, where there is any misrepresentation, or any fraudulent concealment of any material fact, which fact if known might have induced the surety not to enter into the contract, that contract is void from the beginning, as between the creditor and the surety (*b*). But mere non-disclosure of the state of accounts by the creditor to the surety will not avoid the contract (*c*).

It is a general rule of law, that a discharge of the principal is a discharge to the surety. For the engagement of the surety, being but an accessory to the principal's agreement (*d*), terminates with it. If, notwithstanding this release of the principal debtor, the creditor could sue the surety, he would evade the effect of his own discharge to the principal, and regain a debt which he may have relinquished for a valuable consideration, or at least by his deliberate act. Besides, were the surety obliged to pay the creditor, the surety must either be allowed to resort to his principal, or he must not. If he may, then the principal will lose the benefit of that discharge which he received from the creditor; if he may not, the loss occasioned by the creditor's stipulation with the principal will fall on the surety. Further, it is a doctrine of equity that the surety is entitled to all the remedies which the creditor has against the principal, and the creditor by releasing the principal would prejudice those remedies. It is evident, from these considerations, that the only rational and equitable rule is, that which is well established both in law and equity, namely, that a discharge to the principal is a discharge to the surety.

Division of the subject.

In inquiring into the effect of a discharge or indulgence by the holder, to parties liable on a negotiable instrument, let us consider,—1st. What parties to a bill or note are principals, and what parties are sureties; 2ndly. What conduct of the holder will discharge the surety; 3rdly. How the discharge of the surety may be prevented; 4thly. How it may be waived; 5thly. What conduct of the creditor to the surety will discharge the principal debtor; and, lastly, add a few words on the rights of sureties.

(*b*) See *Owen* v. *Homan*, 4 H. of L. Cas. 997; *Hamilton* v. *Watson*, 12 C. & F. 109; *North British Insurance Company* v. *Lloyd*, 10 Exch. 523.

(*c*) *Hamilton* v. *Watson*; *North British Insurance Company* v. *Lloyd*, supra. But see *Railton* v. *Matthews*, 10 C. & F. 934, and the observations of Parke and Alderson, BB., thereon in *North British Insurance Company* v. *Lloyd*.

(*d*) Nam fidejussorum obligatio accessio est principalis obligationis, nec plus in accessione potest esse, quam in principali re. Instit. 3, 20, 5.

CHAPTER XVIII.

WHAT PARTIES TO A BILL ARE PRINCIPALS, AND WHAT PARTIES ARE SURETIES.

First. What parties to a bill are principals, and what parties are sureties.

Suppose the bill to have been accepted and indorsed for value. The acceptor is the principal debtor, and all the other parties are sureties for him, liable only on his default.

But though all the other parties are, *in respect of the acceptor*, sureties only, they are not, *as between themselves*, merely co-sureties, but each prior party is a principal in respect of each subsequent party. For example, suppose a bill to have been accepted by the drawee, and afterwards indorsed by the drawer and by two subsequent indorsers to the holder. As between the holder and the acceptor, the acceptor is the principal debtor, and the drawer and indorsers are his sureties. But as between the holder and the drawer, the drawer is a principal debtor, and the subsequent indorsers are his sureties. As between the holder and the second indorser, the second indorser is the principal, and the subsequent or third indorser is his surety. A discharge, therefore, to the prior parties, the principals, is a discharge to the subsequent parties, the sureties; but a discharge to the subsequent parties, the sureties, is not a discharge to the prior parties, the principals (*e*).

Where a bill is payable to the order of a third person, the payee is a subsequent party, and so a surety for the drawer. He stands in the same situation as the first indorsee and second indorser of a bill drawn payable to the indorser's order (*f*).

It follows, therefore, that a discharge to the acceptor is a discharge to all the parties to the bill; for, if they were still liable, they could either sue the acceptor or they could not. If they could, the discharge to the acceptor would be frustrated; if they could not, they must pay the bill without a remedy over, which would extend their liability beyond their contract. So, a discharge to an indorser is no discharge of the prior indorsers, for they have no remedy against the discharged indorser; but it is a discharge of the subsequent indorsers, for if the holder could notwithstanding recover against them, and they could recover against the prior dis-

(*e*) Where a bill of exchange is drawn by one person upon another, and a third party subscribes his name under that of the drawer, adding the word "surety" to his signature, it has been held in America, that the undertaking of such third party is with the payee or subsequent holder, that the bill shall be accepted and paid, but he incurs no obligation to the drawees. See Byles on Bills, 5th American ed. 378.

(*f*) *Claridge* v. *Dalton*, 4 M. & Sel. 226.

charged indorser, his discharge would be frustrated; if they could not, they must pay the bill without a remedy over (*g*).

On accommodation bills.

It was formerly held, that where a bill was accepted without consideration for the accommodation of the drawer, the drawer was to be considered the principal debtor, and the acceptor as his surety; and, therefore, that time given to the drawer would discharge the acceptor (*h*), but time given to the acceptor would not discharge the drawer (*i*). But this distinction has since been overruled (*j*); and *in Courts of Law* at least the acceptor, in all cases of accommodation bills as well as others, is considered as the principal debtor, though the holder, at the time of making the agreement, or even of taking the bill, knew the acceptance to have been without value (*k*). It is otherwise in equity where the holder had notice, and the equitable doctrine is available under an equitable plea (*l*).

On promissory notes.

As the acceptor is at law in all cases the principal debtor on a bill, so the maker is at law the principal debtor on a note, though it be given by the maker to the payee without consideration (*m*), and the holder take it with notice of the absence of consideration (*n*).

The indorsers of a note severally stand, as principals or sureties, in the same situation as the indorsers of a bill.

(*g*) *Smith* v. *Knox*, 3 Esp. 46; *Claridge* v. *Dalton*, 4 M. & Sel. 232; *Hall* v. *Cole*, 6 Nev. & M. 124; 4 Ad. & El. 577; 1 Har. & W. 722, S. C.

(*h*) *Laxton* v. *Peat*, 2 Camp. 185; see *Yallop* v. *Ebers*, 1 B. & Ad. 698.

(*i*) *Collett* v. *Haigh*, 3 Camp. 281.

(*j*) *Fentum* v. *Pocock*, 5 Taunt. 192; 1 Marsh. 14, S. C.; *Carstairs* v. *Rolleston*, 5 Taunt. 551; 1 Marsh. 207, S. C.; *Smith* v. *Jones*, 2 E. & B. 50, note.

(*k*) "I think," says Parke, J., "that the decision in *Fentum* v. *Pocock* was good sense and good law." *Price* v. *Edmunds*, 10 B. & C. 578; *Harrison* v. *Courtauld*, 3 B. & Ad. 36; *Nichols* v. *Norris*, 3 B. & Ad. 41. The doctrine laid down in *Fentum* v. *Pocock* has, however, been doubted in equity by Lord Eldon. *Ex parte Glendinning*, Buck. 517; *Bank of Ireland* v. *Beresford*, 6 Dow, 233; and by the late Master of the Rolls, Sir John Leach. As to the rule in equity, see however *Hollier* v. *Eyre*, 9 Clark & F. 45; *Strong* v. *Foster*, 17 C. B. 201; *Davies* v. *Stainbank*, 6 De G., Mac. & G. 679. An accommodation acceptor who pays the creditor is, it seems, entitled to all instruments and securities given by the principal debtor. *Dowbiggin* v. *Bourne*, You. 115; *Wodehouse* v. *Farebrother*, 25 L. J., Q. B. 22; 5 E. & B. 277, S. C.; and see now the statutable rule 19 & 20 Vict. c. 97, s. 5; *Pearl* v. *Deacon*, 24 Beav. 186; 1 De G. & J. 461; 26 L. J., Chan. 761, S. C.

(*l*) *Bailey* v. *Edwards*, 34 L. J., Q. B. 41; 4 B. & S. 761, S. C.

(*m*) *Carstairs* v. *Rolleston*, 5 Taunt. 551; 1 Marsh. 207, S. C.

(*n*) *Nichols* v. *Norris*, 3 B. & Ad. 41.

CHAPTER XVIII.

On a joint and several note.

When of a joint and several note one maker is in reality principal and the other surety, yet it is no defence *at law* that one is principal and the other is surety, that this was known to the creditor at the time of the contract, and, consequently, that the surety is discharged by time given to the principal (*o*). But such a defence is plainly available in equity (*p*), and therefore may be the ground of an equitable plea.

WHAT CONDUCT OF THE CREDITOR DOES OR DOES NOT DISCHARGE THE SURETY.

Secondly. As to what conduct of the creditor will discharge the surety.

The creditor must not, as we have already seen, conceal from the surety any stipulation in the original contract, disadvantageous to the principal debtor. Such concealment is a fraud, and releases the surety (*q*).

(*o*) *Price* v. *Edmunds*, 10 B. & C. 578; *Perfect* v. *Murgrave*, 6 Price, 111; *Manley* v. *Boycott*, 2 E. & B. 46; *Strong* v. *Foster*, 17 C. B. 201; *Hollier* v. *Eyre*, 9 Clark & F. 45. But evidence to that effect has been admitted. *Garrett* v. *Jull*, 1 S. N. P. 11th ed. 407; *Hall* v. *Willcox*, 1 M. & Rob. 58. In *Clarke* v. *Wilson*, 3 M. & W. 208, it was intended to have raised the question, but on demurrer to defendant's plea judgment was given for the plaintiff. In *Rees* v. *Berrington*, 2 Ves. jun. 540, Lord Loughborough says, referring to *legal* obligations, "that where two are bound jointly and severally, the surety cannot aver by pleading that he is bound as surety." See *Ashbee* v. *Pidduck*, 1 M. & W. 564, and *Thompson* v. *Clubley*, 1 M. & W. 212. But in equity, a surety may aver and prove that he was only a surety, though the bond was joint and several. *Heath* v. *Key*, 1 Y. & J. 434; *Nisbett* v. *Smith*, 2 Bro. C. C. 581; *Skip* v. *Hucy*, 3 Atk. 91. The authorities are contradictory; but, on principle, such evidence is inadmissible at law as against the creditor; for it is parol evidence to make a written contract conditional, which, on the face of it, is absolute. The evidence does not show absence of consideration as in the case of an accommodation acceptance. Besides, the introduction of such evidence might affect an innocent indorsee with stipulations of which he had no notice. But when the question arises not between the creditor and his debtors, but between those debtors themselves, whether one was principal and the other was surety, parol evidence is admissible at law, as in such a case it clearly is in equity. *Craythorne* v. *Swinburne*, 14 Ves. 170; see p. 8; *Reynolds* v. *Wheeler*, 30 L. J., C. P. 350.

(*p*) *Hollier* v. *Eyre*, 9 C. & F. 45; *Davies* v. *Stainbank*, 6 De G. Mac. & G. 679. See, however, *Strong* v. *Foster*, supra. But this case was reflected on in *Pooley* v. *Harradine*, 7 E. & B. 431; and see *Mutual Loan Fund* v. *Sudlow*, 28 L. J., C. P. 108; *Rayner* v. *Fussey*, 28 L. J., Exch. 132; *Taylor* v. *Burgess*, 29 L. J., Exch. 7; 5 H. & N. 1, S. C.; and may be considered to have been finally overruled by the Court of Exchequer Chamber in *Greenough* v. *M'Clelland*, 30 L. J., Q. B. 15.

(*q*) *Pidcock* v. *Bishop*, 3 B. & C. 605; 5 D. & R. 505, S. C.; *Mayhew* v. *Crickett*, 2 Swan. 193; *Stone* v. *Compton*, 5 Bing. N. C. 142; 6 Scott, 816, S. C.; *Jackson* v. *Duchaire*, 3 T. R. 551; *Cecil* v. *Plaistow*, 1 Anst. 202; *Middleton* v. *Lord Onslow*, 1 P. Wms.

And the surety is discharged if the actual original contract between the creditor and the principal debtor varies in the slightest degree from that for which the surety had stipulated (*r*).

So, in all transactions subsequent to the original contract, the surety's remedies, both at law and in equity, against the principal debtor, whether in his own name or in the name of the creditor, must be preserved intact by the creditor (*s*).

The holder of a bill of exchange is not obliged to use active diligence in order to recover against the acceptor (*t*), in the absence of any agreement to do so. He may defer suing him as long as he pleases; he may even promise not to press him, or not to sue him, if the promise be not binding in law. Thus, where the executrix of an acceptor verbally promised to pay the holder out of her own estate, provided he would forbear to sue, and he forbore accordingly, it was held that, the agreement being invalid under the Statute of Frauds, the drawer was not discharged (*u*).

But, if the holder once destroy or suspend, or, by a binding agreement with the acceptor (*v*), contract to destroy or suspend, his right of action against the acceptor, the drawer and indorsers are at once discharged, unless the agreement giving time contain a stipulation that the holder shall, in case of default, have *judgment* at a period as early as he could have obtained judgment if hostile proceedings had continued (*x*). But if the agreement contain a stipulation that a judgment shall be given, it is not necessary to aver in a plea disclosing such an agreement that the time within which the plaintiff might have obtained judgment was postponed (*y*). That it was not must either be specially replied, or may possibly (if the form of the averment in the plea

768; *Brown* v. *Wilkinson*, 13 M. & W. 14.

(*r*) See *Bonsor* v. *Cox*, 4 Beav. 379; affirmed on appeal, 4 Beav. 383; 6 Beav. 110—118.

(*s*) And see as to the duty of the creditor, *Watts* v. *Shuttleworth*, 5 H. & N. 235; affirmed on appeal, 1861.

(*t*) *Orme* v. *Young*, Holt, N. P. 84; *Eyre* v. *Everest*, 2 Russ. 381; 3 Mer. 278; *Trent Navigation* v. *Harley*, 10 East, 34; unless there be a stipulation that the creditor is on default to sue the debtor without delay. *Bank of Ireland* v. *Beresford*, 6 Dow, 233.

(*u*) *Philpot* v. *Briant*, 4 Bing. 717; 1 M. & P. 754; 3 C. & P. 214, S. C.

(*v*) *Fraser* v. *Jordan*, 26 L. J., N. S., Q. B. 288; 8 E. & B. 303, S. C. But an agreement with a *stranger* will not have this effect. Ibid. See, however, *Lyon* v. *Holt*, 5 M. & W. 250.

(*x*) *Kennard* v. *Knott*, 4 M. & Gr. 474; *Michael* v. *Myers*, 6 M. & Gr. 702. Receipt of interest in advance is not necessarily a giving of time. *Rayner* v. *Fussey*, 28 L. J., Exch. 132.

(*y*) *Kennard* v. *Knott*, 4 M. & Gr. 474; *Isaac* v. *Daniel*, 15 L. J., Q. B. 149; 8 Q. B. 500, S. C.; *Moss* v. *Hall*, 5 Exch. 46.

CHAPTER XVIII.

admits of it) be proved under a traverse of an actual forbearance (*z*).

If the creditor engages with the surety that he will enforce payment from the principal debtor within a certain time, his neglect to do so is a good defence in equity (*a*).

Receipt of payment.

Payment by the principal of course discharges the surety. The acceptor of a bill, or maker of a note, is bound to pay on the day the bill or note falls due, and therefore he cannot plead in his own discharge a subsequent tender (*b*). But it has been held that an indorser has a reasonable time within which to pay the bill; and if he pay, or tender payment, within a reasonable time, and before writ issued, perhaps he discharges himself (*c*). And, therefore, payment by the acceptor or maker, though after the note has been dishonoured, if within a reasonable time, and with interest, and before action brought against the indorser, or a tender of such payment, though it would not discharge himself, would, it should seem, discharge the indorser.

Release.

A release to the acceptor or maker discharges the indorsers; and a release of one of several joint acceptors or makers is a release of all. But if it appear on the face of the deed that it was the paramount intention of the parties that the others should be held liable, this intention will be carried into effect by disregarding the form of the deed and construing the release as a covenant not to sue (*d*).

Covenant not to sue.

But a general covenant not to sue discharges the sureties, for that will enure as a release (*e*); or a covenant not to sue within a particular time (*f*), though it do not in law amount to a release, or suspend the action (*g*).

(*z*) In some of the American States due diligence is required. See the authorities in Byles on Bills, 5th American ed. p. 383.

(*a*) *Lawrence* v. *Walmsley*, 31 L. J., C. P. 143; *Watson* v. *Alcock*, 22 L. J., Chan. 858; 4 De G., Mac. & G. 242.

(*b*) *Hume* v. *Peploe*, 8 East, 168.

(*c*) *Walker* v. *Barnes*, 5 Taunt. 240; 1 Marsh. 36, S. C.; *Soward* v. *Palmer*, 2 Mood. 274; 8 Taunt. 277; but see *Siggers* v. *Lewis*, 1 C., M. & R. 370; 4 Tyr. 847; 2 Dowl. 681, S. C.

(*d*) *Solly* v. *Forbes*, 2 Bro. & Bing. 38; *Henderson* v. *Stobart*, 5 Exch. 99; *Price* v. *Barker*, 4 E. & B. 760. *Watson* v. *Gosling*

(*e*) Com. Dig. Release.

(*f*) *At law*, a parol agreement by the creditor not to sue the principal is no discharge to the surety of a liability he has contracted by deed. *Davey* v. *Prendergrass*, 5 B. & Al. 187, recognized in *Price* v. *Edmunds*, 10 B. & C. 582; *Bulteel* v. *Jarrold*, 8 Price, 467; *Cocks* v. *Nash*, 9 Bing. 346; 2 M. & Sc. 434, S. C.; sed vide *Archer* v. *Hale*, 4 Bing. 464; 1 M. & P. 285, S. C.; but, *in equity*, the creditor's giving time to the prin-

So also will a release in law. Therefore, if the holder makes the acceptor his executor, the indorsers are discharged.

Release in law.

A written or verbal agreement, on good consideration (*h*), not to sue the acceptor at all, or not to sue him within a specified time, discharges the drawer and indorsers (*i*); but if such agreement be without consideration, or otherwise void in law, the indorsers are not discharged (*j*).

Agreement not to sue.

The taking of a new bill from the acceptor, payable at a future day, discharges the indorsers (*k*).

Renewing a bill.

Misappropriating or misusing, or losing any security for the debt held by the creditor, discharges the surety (*l*).

Misappropriation of securities.

Discharging the acceptor or a prior indorser from execution against the person, discharges the other indorsers; but discharging a subsequent indorser from execution affords no defence to a prior indorser (*m*). A second execution against the person of the same debtor who has been once discharged is not absolutely void, and therefore a man may be taken again if he has so agreed (*n*).

Discharging from execution.

cipal, although by a parol agreement, is a discharge to the surety of a liability created by deed. *Rees* v. *Berrington*, 2 Ves. jun. 540; *Bulteel* v. *Jarrold*, 8 Price, 467; et vide *Combe* v. *Woolf*, 8 Bing. 161; 1 M. & Sc. 241, S. C.; *Bowmaker* v. *Moore*, 3 Price, 214; 7 Price, 228; *Blake* v. *White*, 1 Y. & C. Exch. Ca. 420. As to circumstances under which a Court of Equity will interfere, see *Heath* v. *Key*, 1 Y. & J. 434. But a covenant not to sue upon a simple contract for a limited time, is not pleadable in bar to an action on the contract against the principal debtor. *Thimbleby* v. *Barron*, 3 M. & W. 210.

(*g*) *Quære*, as to the effect of indulgence as to part of the sum due. See *Mayhew* v. *Crickett*, 2 Swanst. 189.

(*h*) The Court will not estimate the value of the consideration. That would be to inquire whether the bargain were a good one or not. *Moss* v. *Hall*, 5 Exch. 50.

(*i*) Ibid.

(*j*) *Arundel Bank* v. *Goble*, K. B. 1817; Chitty, 9th ed. 413; 2 Chit. 335, S. C.; *Willison* v. *Whitaker*, 2 Marsh. 383; 7 Taunt. 53, S. C.; *Brickwood* v. *Annis*, 5 Taunt. 614; 1 Marsh. 250, S. C.; *Philpot* v. *Briant*, 4 Bing. 717; 1 Moo. & P. 754; 3 C. & P. 244, S. C. See the American authorities in Byles on Bills, 5th American ed. p. 385.

(*k*) *Gould* v. *Robson*, 8 East, 576; *English* v. *Darley*, 2 B. & P. 62; 3 Esp. 49, S. C.

(*l*) *Pearl* v. *Deacon*, 24 Beav. 186; 1 De G. & J. 461; 26 L. J., Ch. 761, S. C.

(*m*) *Hayling* v. *Mulhall*, 2 Bla. 1235. In the marginal note of this case, the words "prior" and "subsequent" are transposed. See *English* v. *Darley*, 2 B. & P. 62; 3 Esp. 49, S. C.

(*n*) *Atkinson* v. *Bayntun*, 1 Bing. N. C. 444; 1 Scott, 404, S. C.

CHAPTER XVIII.

And it is conceived that where the holder of a bill has seized the acceptor's goods in execution, he is in the position of a creditor holding the security of a principal debtor, and may so conduct himself as to discharge the sureties (*o*).

Part-payment.

Part-payment by the principal or by the surety will only discharge the surety (*p*), *pro tanto*.

Offer to give time.

A mere offer to give time to the acceptor not acted upon will not discharge the drawer (*q*).

Cognovit, warrant of attorney, or judge's order.

The taking a cognovit or warrant of attorney or judge's order from the acceptor, though payable by instalments, will not discharge the indorsers, provided the last instalment be not postponed beyond the period when, in the ordinary course of the action, judgment and execution might have been had (*r*). But the instrument must be executed with the statutory formalities (*s*).

(*o*) "It is," says Lord Eldon, "a question fit to be tried at law, whether, if a party takes out execution on a bill of exchange, and afterwards waives that execution, he has not discharged those who were sureties for the due payment of the bill. The principle is, that he is a trustee of his execution for all parties interested in the bill." *Mayhew* v. *Crickett*, 2 Swanst. 190, and see *Smith* v. *Winter*, 4 M. & W. 467; *Lake* v. *Brutton*, 25 L. J., Ch. 842.

But it has been decided, that the withdrawing of an execution against the goods of an acceptor will not discharge the drawer, against whom judgment had been obtained, and that the rule, that giving indulgence to an acceptor without the consent of the drawer discharges such drawer, does not apply after judgment. *Pole* v. *Ford*, 2 Chit. 126; *Bray* v. *Manson*, 8 M. & W. 668; but see *English* v. *Darley*, 2 B. & P. 62; 3 Esp. 49, S. C. It is conceived that when the obligation of a surety is pursued to judgment, he is, *at law*, no longer surety, but an absolute debtor, yet that equity, regarding the substance and not the form of his obligation, may consider him still a surety, entitled to all the securities which the creditor holds, and perhaps discharged by indulgence to the principal. Vide *Bray* v. *Manson*, ubi supra. But a decree in equity against the surety prevents the subsequent giving of time from discharging the surety. *Jenkins* v. *Robertson*, 23 L. J., Ch. 816; 2 Drew. 351, S. C.

(*p*) *Walwyn* v. *St. Quentin*, 1 B. & P. 652; 2 Esp. 515, S. C.

(*q*) *Hewet* v. *Goodrick*, 2 C. & P. 468; *Badnall* v. *Samuel*, 3 Price, 521.

(*r*) *Jay* v. *Warren*, 1 C. & P. 532; and see *Lee* v. *Levy*, 6 Dowl. & R. 475; 4 B. & C. 390; 1 C. & P. 553, S. C.; *Hulme* v. *Coles*, 2 Simon, 12; *Stevenson* v. *Roche*, 9 B. & C. 707; *Price* v. *Edmunds*, 10 B. & C. 578; *Kennard* v. *Knott*, 4 M. & G. 474; *Whitfield* v. *Hodges*, 1 M. & W. 679.

(*s*) *Watson* v. *Alcock*, 1 Sm. & G. 319; 4 De Gex, M. & G. 242.

Judgment.

The obtaining of a judgment against any one party, without satisfaction, is no discharge of any other party (*t*).

Bankruptcy.

If the acceptor become bankrupt, the holder may prove and receive a dividend without prejudice to his remedies against other parties, for the acceptor is, in case of bankruptcy, discharged, not by the act of the holder, but by act of law (*u*).

Insolvency.

Upon the same principle, if the acceptor, being charged in execution at the suit of the indorsee, have been discharged under the old Insolvent Act, the indorsee has his remedy against the drawer (*x*).

Compounding.

But if the holder voluntarily accepts a composition, the indorsers are discharged (*y*).

Collateral security.

Though the taking of a fresh bill from the acceptor in lieu of the dishonoured bill discharges the other parties, it will not have the effect, if the second bill or second security, whatever it be, were given as a collateral security (*z*). Where a bill having been dishonoured, the acceptor transmitted a new bill for a larger amount to the payee, but had not any communication with him respecting the first, and the payee discounted the second bill and indorsed the first to the plaintiff; it was held, that the second bill was merely a collateral security, and that the receipt of it by the payee did not amount to giving time to the acceptor of the first bill, so as to exonerate the drawer. "In cases of this description," says Abbott, C. J., "the rule laid down is, that if time be given to the acceptor, the other parties to the bill are discharged; but in no case has it been said, that taking a collateral security from the acceptor shall have that effect.

(*t*) *Claxton* v. *Swift*, 2 Show. 441, 494; 1 Lutw. 878.

(*u*) *Browne* v. *Carr*, 2 Russ. 600; 7 Bing. 508; *Langdale* v. *Parry*, 2 D. & R. 337.

(*x*) *Nadin* v. *Battie*, 5 East, 147; 1 Smith, 362, S. C.; and see *English* v. *Darley*, 2 B. & P. 62; 3 Esp. 49, S. C. If a creditor execute a deed of composition, having indorsed away bills on the debtor, the deed is no defence to an action on the bills when they are returned to the creditor. *Margetson* v. *Aitken*, 3 C. & P. 383; Dans. & Ll. 157, S. C. Where a man has been discharged from a debt on a note under the Insolvent Act, a new note for the old debt will not bind, though given to procure time for a surety on the old note. *Evans* v. *Williams*, 1 C. & M. 30; 3 Tyr. 226, S. C.

(*y*) *Ex parte Wilson*, 11 Ves. 412; *Ex parte Smith*, Co. B. L. 189; *Ellison* v. *Dezell*, 1 S. N. P. 11th ed. 385.

(*z*) *Gordon* v. *Calvert*, 4 Russ. 581; *Calvert* v. *Gordon*, 7 B. & C. 809.

CHAPTER XVIII.

Here the second bill was nothing more than a collateral security" (*a*). B., being indebted to A., procured C. to join with him in giving a joint and several promissory note for the amount, and afterwards having become further indebted and being pressed by A. for further security by deed reciting the debt, and that for a part a note had been given by him and C., and that A. having demanded payment for the debt, B. had requested him to accept a further security, assigned to A. all his household goods, &c., as a *further* security, it was held, that this did not affect the remedy on the note against C. (*b*). So, where one of the three partners, after a dissolution of partnership, undertook by deed made between the partners to pay a particular partnership debt on two bills of exchange, and that was communicated to the holder, who consented to take the separate notes of the one partner for the amount, strictly reserving his right against all three, and retained possession of the original bills, the separate notes having proved unproductive, it was held, that he might still resort to his remedy against the other partners, and that the taking, under these circumstances, the separate notes, and even afterwards renewing them several times, did not amount to satisfaction of the joint debt (*c*).

Warrant of attorney.

A warrant of attorney may be only a collateral security (*d*).

Discharge of prior parties by giving time to drawee who has not accepted.

Though the drawee should not have accepted the bill, yet it is conceived that the holder, by giving up the bill to him and taking from him a substituted bill at a longer date, would discharge the prior parties, though he have given due notice of dishonour. It is true, the drawee is not the principal debtor, nor at law a debtor to the holder at all, but he is the debtor of the drawer; and, if a man be referred to his own debtor's debtor for payment, and instead of taking cash elects to take a bill, he discharges his own debtor (*e*). If, however, the holder, being unable to obtain cash, take a bill from the drawee as a collateral security, and keep the

(*a*) *Pring* v. *Clarkson*, 1 B. & C. 14; 2 Dowl. & R. 78. See the observations on this case, Bayley, 6th ed. 347.

(*b*) *Twopenny* v. *Young*, 3 B. & C. 208; 5 Dowl. & R. 259, S. C.

(*c*) *Bedford* v. *Deakin*, 2 B. & Al. 210; 2 Stark. 178, S. C.

(*d*) *Norris* v. *Aylett*, 2 Camp. 329; *Bell* v. *Banks*, 3 M. & G. 258.

(*e*) *Strong* v. *Hart*, 9 D. & R. 189; 6 B. & C. 160; *Smith* v. *Ferrand*, 7 B. & C. 19; 9 D. & R. 803; but see *Robinson* v. *Read*, 9 B. & C. 449; 4 M. & R. 349, S. C.

original bill, his remedies on the original bill would not be affected, and, as between himself and the drawee, there would be a good consideration for the new bill (*f*).

HOW THE DISCHARGE OF THE SURETY MAY BE PREVENTED.

Thirdly, as to the means by which the discharge of the principal may be prevented from operating as a discharge of the surety.

It has been repeatedly held, and is now well established, that a giving of time by the creditor to the principal debtor will not discharge the surety, if there be an agreement between the creditor and the principal, that the surety shall not to be thereby discharged (*g*), although the surety himself be no party to the stipulation, or even have no notice of it (*h*). And the surety's remedy over against the principal is intact whether the surety be or be not a party (*i*), unless the instrument amount to a release, or to a release of one of several joint or joint and several debtors (*k*). This stipulation, reserving the rights of the surety, must in general appear on the face of the instrument giving time, and cannot, if the indulgence be in writing, be proved by parol (*l*). But that is not always necessary where the agreement to reserve the sureties' rights is distinct and collateral (*m*).

No indulgence to an acceptor or other prior party will discharge an indorser, if the indorser previously consent to it. Thus, where the acceptor, having been arrested by the holder, offered him a warrant of attorney for the amount of the bill payable by instalments, and, the holder mentioning the offer to the drawer, the drawer said, "You may do as you like, for I have had no notice of the nonpayment;" it was held, that this amounted to an assent, and that the

(*f*) Vide the Chapter on CONSIDERATION, DEBT OF A THIRD PERSON.

(*g*) *Burke's case*, 6 Ves. 809; *Boultbee* v. *Stubbs*, 18 Ves. 20; *Ex parte Glendinning*, Buck. 517; *Ex parte Carstairs*, ibid. 560; *Harrison* v. *Courtauld*, 3 B. & Ad. 36; *Nichols* v. *Norris*, ibid. 41, n.; *Cowper* v. *Smith*, 4 M. & W. 519; *Smith* v. *Winter*, 4 M. & W. 454; *North* v. *Wakefield*, 13 Q. B. 258; *Owen* v. *Homan*, 4 H. L. Cases, 997.

(*h*) *Webb* v. *Hewitt*, 3 K. & J. 438.

(*i*) *Kearsley* v. *Cole*, 16 M. & W. 128; *Webb* v. *Hewitt*, 3 K. & J. 438.

(*k*) Ibid. It is not unusual to insert in the original contract of suretyship a stipulation, that a composition with the principal shall not release the surety. See *Cowper* v. *Smith*, 4 M. & W. 519.

(*l*) Ubi supra.

(*m*) *Ex parte Harvey*, 23 L. J., Bank. 26; *Wyke* v. *Rogers*, 21 L. J., Ch. 611; 1 De G., M. & G. 408, S. C. But see *Ex parte Glendinning*, Buck. 517, where time is given by deed.

CHAPTER XVIII.

drawer (who, in fact, had had notice) was not discharged by the indulgence (*n*).

HOW IT MAY BE WAIVED.

Fourthly, as to the mode in which the operation of indulgence to the principal on the liability of the surety may be waived.

Wherever the surety, with knowledge of the facts, assents either by words or acts to what has already been done, such subsequent assent will be a waiver of his discharge without any new consideration (*o*). Therefore, where time had been given, and the drawer, aware of the fact, but ignorant of the law, and conceiving himself still liable, said, "I know I am liable, and if the acceptor does not pay it I will," the drawer was held to have waived his discharge (*p*). But where a bill was renewed, and an indorsee said, "It was the best thing that could be done," it was held, that this was no recognition of his liability (*q*).

WHAT CONDUCT OF THE HOLDER TOWARDS THE SURETY WILL DISCHARGE THE PRINCIPAL.

Fifthly, as to discharge of principal by dealings with surety.

If the principal and sureties are jointly liable, *e. g.* if they are joint makers of a note, then a discharge to a surety by the creditor releasing him, or making him executor, or taking from him a composition and erasing his name from the note, will be a discharge of the co-surety, and also of the principal debtor (*r*); but the discharge, in this case, does not proceed on the law of principal and surety.

RIGHTS OF SURETIES.

Surety's right to indemnity.

Lastly, as to the rights of sureties.

If one who is surety on a joint and several note, signed by the principal, pay the amount, though without any request or compulsion by the creditor, he may recover it of the principal (*s*). A surety, on payment of the debt, is entitled in equity to existing securities which the creditor may possess against the principal debtor (*t*). And he has now

(*n*) *Clark* v. *Devlin*, 3 B. & P. 363.

(*o*) *Mayhew* v. *Crickett*, 2 Swanst. 185; *Smith* v. *Winter*, 4 M. & W. 467.

(*p*) *Stevens* v. *Lynch*, 12 East, 38; 2 Camp. 332, S. C.; *Smith* v. *Winter*, 4 M. & W. 454.

(*q*) *Withall* v. *Masterman*, 2 Camp. 179; *Clark* v. *Devlin*, 3 B. & P. 363; *Tindal* v. *Brown*, 1 T. R. 167; *English* v. *Darley*, 2 B. & P. 61.

(*r*) *Nicholson* v. *Revill*, 4 Ad. & E. 675; 6 N. & M. 192; 1 Har. & W. 753, S. C.

(*s*) Or the co-surety's proportion of the co-surety. *Pitt* v. *Purssord*, 8 M. & W. 538.

(*t*) See *Copis* v. *Middleton*, 1 T. & R. 229; *Hodgson* v. *Shaw*, 3 M. & K. 190; *Goddard* v. *White*, 2 Giff. 449; *Newton* v. *Chorlton*, 10 Hare, 651.

such a right even at law, on giving a proper indemnity, and may sue in the creditor's name (*u*). A contract to indemnify a surety entitles the surety to interest (*v*).

A promise by a stranger to indemnify a surety is not within the 4th section of the Statute of Frauds, and therefore need not be in writing (*x*).

If a surety pay money to the creditor under a mistake as to the fact supposed to constitute his liability, he may recover it back (*y*).

Of contribution between co-sureties.

Where the sureties are not, as between themselves, principal and surety, as are a prior and subsequent indorser of a bill or note, but merely co-sureties, as are two or more joint, or joint and several, makers of a note, if one be called on to pay the whole debt, the others shall severally contribute in equal proportions.

And though the same debt be secured by different instruments, executed by different sureties, and though one portion of the debt be secured by one instrument, and one by another, and different sureties execute each, still there is mutual contribution (*z*); nay, even though the surety seeking contribution did not at the time of the contract know that he had any co-sureties. For the right of a co-surety to enforce contribution does not depend upon contract, but upon the equity of the case (*a*).

Action between co-sureties.

A surety has a right of action against his principal for every sum that he pays, and a right of action against his co-surety as soon as he has paid more than his own due proportion of the debt (*b*). He has a fresh right of action against the co-surety for every sum that he pays beyond that amount.

The proper legal remedy for a surety, who has paid more than his due proportion of the debt against his co-surety, is an action for money paid to the use of the co-surety (*c*). But a surety cannot at law recover more than an aliquot

(*u*) 19 & 20 Vict. c. 97, s. 5. *Batchellor* v. *Lawrence*, 9 C. B. (N. S.) 543.

(*v*) *Petre* v. *Duncombe*, 20 L. J., Q. B. 242.

(*x*) *Cripps* v. *Hartnall*, 32 L. J., 381, Exch. Chamber; *Batson* v. *King*, 4 H. & N. 739.

(*y*) *Mills* v. *Alderbury Union*, 3 Exch. 590.

(*z*) *Deering* v. *Earl of Winchelsea*, 2 Bos. & P. 270; 1 Cox, 318, S. C.; *Mayhew* v. *Crickett*, 2 Swanst. 184.

(*a*) See *Craythorn* v. *Swinburne*, 14 Ves. 169; *Reynolds* v. *Wheeler*, 30 L. J., C. P. 350.

(*b*) *Davies* v. *Humphreys*, 6 M. & W. 153; *Cowell* v. *Edwards*, 2 B. & P. 268; *Browne* v. *Lee*, 6 B. & C. 689.

(*c*) *Kemp* v. *Finden*, 12 M. & W. 421.

CHAPTER XVIII.

part of the debt against his co-surety, although others of the sureties be insolvent (*d*). To distribute the loss arising from the insolvency of co-sureties, a co-surety must resort to equity. And although in equity the loss arising from the insolvency of sureties must be equally borne by the solvent sureties, yet that liability may be restrained by the express contract of the sureties (*e*). And a collateral surety may contract to be liable only in the event of the default of the principal debtor and the other sureties (*f*). A surety is not in general liable for interest.

The right of a surety to contribution from his co-surety is not prejudiced by the plaintiff possessing a security against the principal debtor which the defendant does not possess, and of which he was not aware (*g*).

Determination of the contract.

It has been held, that a surety on a continuing guarantee has a right to determine his liability for future advances by notice (*h*). Even although the duration of the advances be limited by the instrument of suretyship (*i*).

(*d*) *Cowell* v. *Edwards*, 2 Bos. & P. 268; *Browne* v. *Lee*, 6 B. & C. 689; *Batard* v. *Hawes*, 22 L. J., Q. B. 443.

(*e*) *Swaine* v. *Ware*, 1 Cha. Rep. 149; *Collins* v. *Prosser*, 1 B. & C. 682.

(*f*) *Craythorn* v. *Swinburne*, 14 Vesey, 160; *Harthey* v. *O'Flaherty*, L. & G. temp. Plunket, 217.

(*g*) *Done* v. *Whalley*, 17 L. J., Exch. 225; 2 Exch. 198, S. C.

(*h*) Per Lord Tenterden, *Brocklebank* v. *Moore*, 2 Stark. on Ev. 371.

(*i*) *Offord* v. *Davis*, 31 L. J., C. P. 319.

CHAPTER XIX.

OF PROTEST AND NOTING.

Protest necessary on Foreign Bills, and why . 255
By whom to be made . 256
Office of a Notary . . 256
When to be made . . 256
Where to be made . . 256
Form of Protest . . 257
Stamp on Protest . . 257
Protest for better Security . 257
Noting, what . . . 257
Notice of Protest . . 258
Copy of Protest . . 258
When Protest excused . 259
Protest of Inland Bills and Notes 259
Protest of lost Bill . . 260
Pleading 260
Evidence 260
Effect of a Promise to pay 260

Protest necessary on foreign bills, and why.

WHEN a foreign bill is refused acceptance or payment, it was and still is necessary, by the custom of merchants, in order to charge the drawer, that the dishonour should be attested by a protest (*a*). For, by the law of most foreign nations (*b*), a protest is, or was, essential in case of dishonour of any bill; and, though by the law of England it is unnecessary in the case of an inland bill, yet, for the sake of uniformity in international transactions, a foreign bill must be protested (*c*). Besides, a protest affords satisfactory evidence of dishonour to the drawer, who, from his residence abroad, might experience a difficulty in making proper inquiries on the subject, and be compelled to rely on the representation of the holder. It also furnishes an indorsee with the best evidence to charge an antecedent party abroad; for foreign Courts give credit to the acts of a public functionary, in the same manner as a protest under the seal of a foreign notary is evidence, in our Courts, of the dishonour of a bill payable abroad (*d*).

But a protest is not necessary on a foreign promissory note (*e*).

(*a*) *Gale* v. *Walsh*, 5 T. R. 239; *Rogers* v. *Stephens*, 2 T. R. 713; *Orr* v. *Maginnis*, 7 East, 359; 3 Smith, 328, S. C.

(*b*) Poth. 217.

(*c*) See *Borough* v. *Perkins*, 1 Salk. 131; 2 Ld. Raym. 993; 6 Mod. 80, S. C.; and the argument in *Trimby* v. *Vignier*, 1 Bing. N. C. 151; 4 M. & Sc. 695; 6 C. & P. 25, S. C., as to a protest of a French bill payable in France.

(*d*) *Anon.*, 12 Mod. 345; Rep. temp. Holt, 297.

(*e*) *Bonar* v. *Mitchell*, 19 L. J., Exch. 302; 5 Exch. 415, S. C.

CHAPTER XIX.

By whom to be made.

The protest should be made by a notary public; but, if there be no such notary in or near the place where the bill is payable, it may be made by an inhabitant, in the presence of two witnesses (*f*).

Office of a notary.

A notary, *registrarius*, *actuarius*, *scrinarius*, was anciently a scribe that only took *notes* or minutes, and made short drafts of writings and other instruments, both public and private. He is at this day a public officer of the civil and canon law, appointed by the archbishop of Canterbury, who, in the instrument of appointment, decrees, "that full faith be given, as well in as out of judgment, to the instruments by him to be made" (*g*). This appointment is also registered and subscribed by the clerk of her Majesty for faculties in Chancery. The present act for the regulation of notaries is the 41 Geo. 3, c. 79 (*h*). By the 11th section of this statute, any person acting for reward as a notary, without being duly admitted, forfeits 50*l.* to him that will sue for the same.

By the 6 Geo. 4, c. 87, s. 20, her Majesty's consuls at foreign ports or places are empowered to do all notarial acts.

And, by the 3 & 4 Will. 4, c. 70, attornies residing more than ten miles from the Royal Exchange may be admitted to practise as notaries.

When to be made.

The protest of a foreign bill should be begun, at least (and such an incipient protest is called noting), on the day on which acceptance or payment is refused (*i*); but it may be drawn up and completed at any time before the commencement of the suit (*k*), or even before or during the trial (*l*), and ante-dated accordingly. An inland bill cannot be protested for non-payment till the day after it is due (*m*). Bank Holidays Act 1871

Where to be made.

A protest is usually made where the dishonour occurred (*n*). The 2 & 3 Will. 4, c. 98, enacts, that a bill made payable

(*f*) Bayley, 210.

(*g*) Ayliffe's Parergon, 385; 3 Burn's Eccl. Law, 1.

(*h*) And see 6 & 7 Vict. c. 90.

(*i*) B. N. P. 272.

(*k*) *Chaters* v. *Bell*, 4 Esp. 48; Selw. 11th ed. 381, S. C.; but see *Vandewall* v. *Tyrrell*, M. & M. 87, where there is payment for honour. But this case does not support the position that the notarial act cannot be formally extended afterwards; *Geralopulo* v. *Wieler*, 10 C. B. 690.

(*l*) Bull. N. P. 272; *Orr* v. *Maginnis*, 7 East, 361; Thompson on Bills, p. 147.

(*m*) 9 & 10 Will. 3, c. 17.

(*n*) See *Mitchell* v. *Baring*, 10 B. & C. 4; M. & M. 381; 4 C. & P. 35, S. C.

by the drawer at a place other than the drawee's residence, and which bill shall not be accepted on presentment, shall be, without further presentment, protested for non-payment in the place where it has been made payable (*o*).

Form of protest.

A protest is, in form, a solemn declaration, written by the notary under a fair copy of the bill, stating that payment or acceptance has been demanded and refused, the reason, if any, assigned, and that the bill is therefore protested. When the protest is made for a qualified acceptance, it must not state a general refusal to accept, otherwise the holder cannot avail himself of the qualified acceptance (*p*).

Stamp on protest.

Where the stamp duty on the bill or note does not exceed 1*s*., a protest is subject to the same duty as on the bill or note, and a protest of any other bill of exchange or promissory note to the duty of 1*s*. (*q*), and a further progressive duty of 1*s*. for every sheet or piece of paper upon which the same is written after the first.

Protest for better security.

Besides the protest for non-acceptance and for non-payment, the holder may protest the bill for *better security*. Protest for better security is, where the acceptor becomes insolvent, or where his credit is publicly impeached before the bill falls due. In this case, the holder may cause a notary to demand better security; and, on its being refused, the bill may be protested, and notice of the protest may be sent to an antecedent party. Yet, it seems, the holder must wait till the bill falls due before he can sue any party. Nor does there appear any advantage from the protest more than from simple notice of the circumstances (*r*); except that, after such a protest, there may be a second acceptance for honour (*s*). Whereas, without the intervention of a protest, there cannot be two acceptances on the same bill (*t*).

Noting, what.

Noting is a minute made on the bill by the officer at the time of refusal of acceptance or payment. It consists of his initials, the month, the day, the year, and his charges for minuting (*u*); and is considered as the preparatory step to protest. "Noting," says Mr. J. Buller, "is unknown in

(*o*) See the Statute in the APPENDIX.

(*p*) *Bentinck* v. *Dorrien*, 6 East, 199; 2 Smith, R. 337, S. C.; *Sproat* v. *Matthews*, 1 T. R. 182.

(*q*) 24 & 25 Vict. c. 91, s. 25.

(*r*) *Anon.*, 1 Ld. Raym. 743; Chitty, 9th ed. 343; Mar. 110.

(*s*) *Ex parte Wackerbath*, 5 Ves. 574.

(*t*) *Jackson* v. *Hudson*, 2 Camp. 447.

(*u*) Kyd, 87.

CHAPTER XIX.

the law, as distinguished from the protest: it is merely a preliminary step to the protest, and has grown into practice within these few years" (*x*). A bill, however, is often noted, where no protest is either meant or contemplated, as in the case of many inland bills. The use of it seems to be, that a notary being a person conversant in such transactions, is qualified to direct the holder to pursue the proper conduct in presenting a bill, and may, upon a trial, be a convenient witness of the presentment and dishonour. In the mean time, the minute of the notary, accompanying the returned bill, is satisfactory assurance of non-payment or non-acceptance, to the various parties by whom the amount of the bill may be successively paid. In case of an inland bill, as it can only be protested under the statute, and the fees of a notary for protesting are thereby fixed at 6*d.*, it has been said, that no more can be charged for noting (*y*), though it is usual to charge more (*z*).

The Court will not allow the expense of noting to be recovered against the acceptor (*a*), unless it be laid as special damage in the declaration. But in actions brought under the 18 & 19 Vict. c. 67 (*b*), the expenses of noting may be recovered.

Notice of protest.

If the drawer reside abroad, a copy, or some memorial of the protest, ought to accompany the notice of dishonour (*c*). But notice of the protest certainly is not necessary, if the drawer resides within this country, though, at the time of non-acceptance, he may happen to be abroad (*d*); nor if, at the time of dishonour, he have returned home to this country. "If," says Lord Ellenborough, "the party is abroad, he cannot know of the fact of the bill having been protested, except by having notice of the protest itself; but, if he be at home, it is easy for him, by making inquiry, to ascertain that fact" (*e*).

Copy of protest.

And it is now decided that a *copy* of the protest need not in any case be sent (*f*).

(*x*) *Leftley* v. *Mills*, 4 T. R. 170.

(*y*) *Leftley* v. *Mills*, 4 T. R. 170; Chitty, 9th ed. 465.

(*z*) Vide APPENDIX.

(*a*) *Hobbs* v. *Christmas*, Sittings after Mms. T. 1831; *Kendrick* v. *Lomax*, 2 C. & J. 405; 2 Tyrw. 488, S. C.; *Rogers* v. *Hunt*, 10 Exch. 474.

(*b*) Post, Chapter XXXIII.

(*c*) Bayley; Poth. 148; *Robins* v. *Gibson*, 1 M. & S. 288; vide supra, Chapter on NOTICE OF DISHONOUR.

(*d*) *Oromwell* v. *Hynson*, 2 Esp. 511.

(*e*) *Robins* v. *Gibson*, 1 M. & Sel. 288; 3 Camp. 334, S. C.

(*f*) *Goodman* v. *Harvey*, 4 Ad. & E. 870; 6 N. & M. 372, S. C.

When protest excused.

Proof of a protest of a foreign bill is excused, if the drawer had no effects in the hands of the drawee, and no reasonable expectation that the bill would be honoured (*g*); or if the drawer has admitted his liability, by promising to pay. "By the drawer's promise to pay," observes Lord Ellenborough, "he admits the existence of every thing which is necessary to render him liable. When called upon for payment of the bill, he ought to have objected that there was no protest. Instead of that, he promises to pay it. I must, therefore, presume he had due notice, and that a protest was regularly drawn up by a notary" (*h*).

And it is said, that where the drawer adds a request or direction, that in the event of the bill not being honoured by the drawee, it shall be returned without protest, by writing the words "*retour sans protêt*," or "*sans frais*," a protest as against the drawer, and perhaps as against the indorsers (*i*), is unnecessary.

Protest of inland bills and notes.

Inland bills may be protested for non-payment under the 9 & 10 Will. 3, c. 17, and for non-acceptance under the 3 & 4 Anne, c. 9. But it has been held, that a protest is unnecessary, except to enable the holder to recover interest (*k*); and subsequent and uniform practice, confirmed by a late decision (*l*), has settled that it is superfluous even for this purpose.

Foreign bills are very frequently protested, both for non-acceptance and non-payment; but a protest is hardly ever made for non-acceptance of an inland bill, though it is sometimes protested for non-payment (*m*). It is conceived, that a protest of an inland bill is unknown to the common law, and must, therefore, derive its efficacy from the above enactments; from which it will follow, that it is applicable only to such instruments as are therein described, and that the steps therein required must be taken. As the 3 & 4 Anne, c. 9, puts promissory notes on the same footing as bills, it should seem to authorize a protest: and such protest is accordingly sometimes made (*n*). It would, therefore, be of no practical benefit further to discuss the provisions of these

(*g*) *Legge* v. *Thorpe*, 12 East, 171; 2 Camp. 310, S. C.

(*h*) *Gibbon* v. *Coggon*, 2 Camp. 188; *Patterson* v. *Beecher*, 6 Moore, 319; *Greenway* v. *Hindley*, 4 Camp. 52.

(*i*) 1 Pardessus, 540; Chitty, 10th ed. 114.

(*k*) *Harris* v. *Benson*, 2 Stra. 910.

(*l*) *Windle* v. *Andrews*, 2 B. & Ald. 696; 2 Stark. 425, S. C.

(*m*) Kyd, 95; 2 & 3 Will. 4, c. 98.

(*n*) Kyd, 97.

CHAPTER XIX.

too loosely drawn and obscure statutes, with respect to the protest of inland bills.

Protest of lost bill.

The loss of a bill is no excuse for the absence of protest (*o*).

Pleading.

In an action against the drawer of a foreign bill, protest must be averred (*p*) as well as proved; and it has been held that, if protest of an inland bill be set forth in pleading, it must be proved (*q*). But this decision proceeded on the ground that an allegation of protest of an inland bill involved a consequential claim for interest and costs; whereas it has been since decided, that such a claim may be made without protest (*r*).

Evidence.

In an action on a foreign bill, presented abroad, the dishonour of the bill will be proved by producing the protest, purporting to be attested by a notary public: or, if there is not any notary near the place, purporting to have been made by an inhabitant, in the presence of two witnesses (*s*). But a protest made in England is not evidence of the presentment here (*t*).

Effect of a promise to pay.

A promise to pay is good *primâ facie* evidence of protest (*u*), and of notice thereof (*x*).

(*o*) Pothier, 145.

(*p*) But the absence of the allegation of protest is a defect of form only. *Solomons* v. *Stavely*, 3 Doug. 298; *Gale* v. *Walsh*, 5 T. R. 239; *Armani* v. *Castrique*, 13 M. & W. 443.

(*q*) *Boulager* v. *Talleyrand*, 2 Esp. 550.

(*r*) *Windle* v. *Andrews*, 2 B. & Ald. 696; 2 Stark. 425, S. C.

(*s*) *Anon.*, 12 Mod. 345; Rep. temp. Holt, 297, S. C.

(*t*) *Chesmer* v. *Noyes*, 4 Camp. 129.

(*u*) *Patterson* v. *Beecher*, 6 Moore, 319; *Gibbon* v. *Coggon*, 2 Camp. 188; *Campbell* v. *Webster*, 15 L. J., C. P. 4; 2 C. B. 258, S. C.; *Greenway* v. *Hindley*, 4 Camp. 52.

(*x*) Ibid.

CHAPTER XX.

OF ACCEPTANCE SUPRA PROTEST, OR FOR HONOUR (*a*).

Mode of such Acceptance . 261
Who may so accept . . 262
Conduct which Holder should pursue . . 262
Liability of Acceptor supra Protest 263
What Acceptance supra Protest *admits* . . 264
Rights of Acceptor supra Protest 265

CHAPTER XX.

Mode of such acceptance.

WHEN acceptance is refused, and the bill is protested for non-acceptance, or where it is protested for better security, any person may accept it, *supra protest* (*b*), for the honour of the drawer, or of any one of the indorsers. The method of accepting, *supra protest*, is said to be as follows, *viz.* the acceptor, *supra protest*, must personally appear before a notary public, with witnesses, and declare that he accepts such protested bill in honour of the drawer or indorser, as the case may be, and that he will satisfy the same at the appointed time; and then he must subscribe the bill with his own hand, thus—"Accepted, *supra protest*, in honour of A. B.," &c. (*c*); or, as it is more usual, "Accepts, S. P." And a general acceptance, *supra protest*, which does not

(*a*) Called in French, "Acceptation par Intervention," Code de Commerce, 126.

(*b*) I am not aware of any authority to show that there may be an acceptance for honour without a protest, and the statute 6 & 7 Will. 4, c. 58, seems to assume that bills accepted for honour are always protested; see *Vandewall* v. *Tyrrell*, M. & M. 87; *Geralopulo* v. *Wieler*, 10 C. B. 690; Bayley, 6th ed. 181; Noguier, Lettres de Change, ss. 584—591. Unless, indeed, there be a direction to another person in case of need. Chitty, 165, 236. Where the direction, in case of need, is appended, it is said to be necessary to present a *foreign* bill to that other person. But then he is more properly an original alternative drawee, than an acceptor for honour. As to a direction "in case of need" on an indorsement, see *Leonard* v. *Wilson*, 2 C. & M. 589. There seems from that case no *obligation* to present an inland bill (where the direction in case of need is given by an indorser) to the party to whom in case of need it may be presented. The referee, in case of need, appointed by the indorser, though agent to pay the bill is not agent to receive notice of dishonour. *In re Leeds Banking Company*, Law Rep., 1 Equity, 76; 35 L. J., Ch. 33.

(*c*) Beawes, pl. 38.

CHAPTER XX.

express for whose honour it is made, is considered as made for the honour of the drawer (*d*).

Who may so accept.

Any person may accept a bill *supra protest:* and the drawee himself, though he may refuse to accept the bill generally, may yet accept it *supra protest*, for the honour of the drawer or of an indorser (*e*). And though we have seen that, after one general acceptance, there cannot be another acceptance (*f*), yet, when a bill has been accepted, *supra protest*, for the honour of one party, it may, by another individual, be accepted, *supra protest*, for the honour of another (*g*). In no one case is the holder obliged to take an acceptance for honour (*h*).

Conduct which holder should pursue.

The holder of a dishonoured bill, who is offered an acceptance for the honour of some one of the preceding parties to the bill, should first cause the bill to be protested, and then to be accepted, *supra protest*, in the manner above described. At maturity he should again present it to the drawee for payment, who may, in the meantime, have been put in funds by the drawer for that purpose. If payment by the drawee be refused, the bill should be protested a second time for non-payment (*i*), and then presented for payment to the acceptor for honour (*k*). Doubts having arisen as to the day when the bill should be again presented to the acceptor for honour, or referee, in case of need, for payment, the 6 & 7 Will. 4, c. 58, enacts, that it shall not be necessary to present, or in case the acceptor for honour or referee live at a distance, to forward for presentment, till the day following that on which the bill becomes due (*l*).

(*d*) Chitty, 9th ed. 344; Beawes, 89.

(*e*) Beawes, 88. And it has been held in America that it is no objection that the acceptor, *supra protest*, takes the guarantee of the drawee. Byles on Bills, 5th American edition, 403.

(*f*) *Jackson* v. *Hudson*, 2 Camp. 447.

(*g*) Beawes, pl. 42.

(*h*) *Mutford* v. *Walcott*, 12 Mod. 410; 1 Ld. Raym. 575, S. C.; Beawes, 87; *Gregory* v. *Walcup*, Comb. 76; *Pillans* v. *Van Mierop*, 3 Burr. 1668.

(*i*) *Hoare* v. *Cazenove*, 16 East, 391.

(*k*) *Williams* v. *Germaine*, 7 B. & C. 477; 1 M. & R. 364, S. C.

(*l*) According to the French law the acceptor for honour is bound to give notice to the person for whose honour he accepts. "L'INTERVENANT EST TENU DE NOTIFIER SANS DELAI SON INTERVENTION A CELUI POUR QUI IL EST INTERVENU," Code de Commerce, 127:—"Parce que autrement," says Rogron, "le tireur, ignorant ce qui est arrivé, pourrait envoyer la provision au tiré; l'observation de cette disposition donne lieu à des dommages-intérêts contre l'accepteur par intervention si le tireur en éprouve quelque préjudice." But according to Beawes, pl. 47, any one accepting a bill, *supra*

In a case which attracted much attention, it was proved, that where a foreign bill, drawn upon a merchant residing in Liverpool, payable in London, is refused acceptance, the usage is to protest it for non-payment in London. The bill is put into the hands of a notary, and he formerly used to make protest at the Royal Exchange, but that custom is obsolete: the notary now is merely desired by the holder to seek payment of the bill, and on a declaration by the holder that the drawee has not remitted any funds, or sent to say where the bills will be paid, the notary at once marks it as protested for non-payment. The Court (with the exception perhaps of Mr. J. Bayley) seemed to think this might, if the bill were payable in London, be, in ordinary cases, sufficient. But they were all agreed that it would not have been sufficient in the principal case to charge the acceptor, *supra potest*, because the acceptance was in these words—"*If regularly protested and paid when due;*" and they said the drawees could not be said to refuse, unless they were asked. The Court also appear to have been clear, that though there might be cases in which an exhibition of the bill to a notary in London is sufficient, yet that in all cases a bill *may* be sent to the drawee, and indeed that such is the more regular course (*m*).

By the 2 & 3 Will. 4, c. 98, it is enacted, that all bills made payable by the drawee in any place other than his residence, are, on non-acceptance, to be without further presentment protested for non-payment in the place where they are made payable.

Liability of acceptor *supra protest.*

The undertaking of the acceptor, *supra protest*, is not an absolute engagement to pay at all events, but only a collateral conditional engagement to pay, if the drawee do not. "It is," says Lord Ellenborough, "an undertaking to pay, if the original drawee, upon a presentment to him for payment, should persist in dishonouring the bill, and such dishonour by him be notified, by protest, to the person who has accepted for honour" (*n*). The learned Judge proceeds

protest, for the honour of the drawers or indorsers, though without their order or knowledge, has his remedy against the person for whose honour he accepted. It seems, that, according to the Scotch law, a holder may take an acceptance *supra protest*, and yet sue the drawer or indorsers. Thompson, 489. Such is certainly the French law: "*Le porteur de la lettre de change conserve tous ses droits contre le tireur et les endosseurs à raison du défaut d'acceptation par celui sur qui la lettre était tirée, nonobstant toutes acceptations par intervention.*" Code de Comm. 128.

(*m*) *Mitchell* v. *Baring*, 10 B. & C. 4; M. & M. 381; 4 C. & P. 35, S. C.

(*n*) *Hoare* v. *Cazenove*, 16 East,

CHAPTER XX.

to lay down the doctrine that a second protest is necessary; observing: "The use and convenience, and, indeed, the necessity of a protest upon foreign bills of exchange, in order to prove, in many cases, the regularity of the proceedings thereupon, is too obvious to warrant us in dispensing with such an instrument in any case where the custom of merchants, as reported in the authorities of law, appears to have required it (*o*). And a second protest, for non-payment by the drawee, is, after acceptance, ***supra protest***, equally necessary, in order that either the holders may charge the acceptor, ***supra protest***, or the acceptor, ***supra protest***, may charge the party for whose honour the acceptance was given. The object of an acceptance for honour is to save to the holder all those rights which he would have enjoyed, had the bill been accepted in a regular manner. If the bill be drawn payable at a certain period after sight, and accepted ***supra protest***, a second presentment for payment, and protest and notice, is still essential, for the purpose of enabling the holder to sue either drawer or acceptor, ***supra protest***, or enabling the latter to sue the party for whose honour he has accepted. And the time which the bill has to run is computed, not from the date of the exhibition to the drawee, but from the date of the acceptance ***supra protest*** (*p*). Presentment to the drawee, and protest, must be averred in the declaration (*q*). The acceptor, ***supra protest***, becomes liable to all parties on the bill subsequent to him for whose honour the acceptance was made (*r*).

What acceptance *supra protest* admits.

The acceptor, ***supra protest***, admits the genuineness of the signature, and is bound by any estoppel binding on the party for whose honour he accepts. Thus, where a bill was drawn in favour of a non-existing person or order, but the name of the drawer and the name of the payee and first

391. See *Vandewall* v. *Tyrrell*, M. & M. 87. In America it is held that where a draft has been protested for non-acceptance, the holder is not bound to present it at maturity for payment. *Exeter Bank* v. *Gordon*, 8 New Hamp. 66. But this is not so when there has been an acceptance ***supra protest***. An acceptor for the honour of the drawer cannot recover against him without proof of presentment for acceptance or payment and refusal, and notice to the drawer. *Baring* v. *Clark*, 19 Pick. 220. He who accepts, ***supra protest***, is not liable unless demand of payment is made on the drawer and notice of the refusal given. *Schofield* v. *Bayard*, 3 Wendell, 491. See Byles on Bills, 5th American ed. 405.

(*o*) Ibid.

(*p*) *Williams* v. *Germaine*, 7 B. & C. 468; 1 Man. & R. 394, 403, S. C.

(*q*) Ibid.

(*r*) *Hoare* v. *Cazenove*, 16 East, 391; Bayley, 6th ed. 178; Beawes, 33; Marius, 21; *Ex parte Wackerbath*, 5 Ves. 574.

indorser were both forged and the defendant accepted for the honour of the drawer, it was held that the defendant was estopped from disputing that the drawer's signature was genuine, and that the bill was drawn in favour of a non-existing person, was negotiable, and had become payable to bearer (*s*).

Rights of acceptor *supra protest.*

By acceptance *supra protest*, the party for whose honour it was made, and all parties antecedent to him, become liable to the acceptor, *supra protest*, for all damages which he may incur by reason of his acceptance (*t*). The acceptor *supra protest*, where the bill has been protested for better security, has his remedy also against the acceptor (*u*). It was once held (*v*) that a party paying for the honour of the drawer had no claim on the assignees of the accommodation acceptor, because the drawer himself had none, but in a recent case it was decided that he could recover against the acceptor whether the acceptance were given for value or not (*w*).

(*s*) *Phillips* v. *Im Thurn*, L. R., 1 C. P. 220.

(*t*) Beawes, 47.

(*u*) *Ex parte Wackerbath*, 5 Ves. 574.

(*v*) *Ex parte Lambert*, 13 Ves. 179.

(*w*) *Ex parte Swan*, L. R., 6 Eq. 344. In America it is held that if a third party takes up a bill at its maturity for the honour of the drawer, and at his request, he thereby releases the accommodation acceptor of such bill, whether he intended it or not. See Byles on Bills, 5th American ed. 408.

CHAPTER XXI.

OF PAYMENT SUPRA PROTEST, OR FOR HONOUR.

What, and how made . 266
Right of Party paying supra Protest. . . . 266
Notice of Dishonour by . 267
Cannot revive Liability . 267
Payment without Protest . 267
Safest Mode of taking up a Bill for Honour . . 267
Accommodation Bills . 267
When the Protest should be made 268
No Payment supra Protest *of Promissory Notes* . 268

CHAPTER XXI.

What, and how made.

PAYMENT, *supra protest*, is where a bill of exchange, having been protested for non-payment, is paid by another person, for the honour of some one of the parties. Any party to a bill of exchange, whether drawer, drawee, payee or indorser, may pay for honour. So may a *mere stranger*, without any previous request or authority from the party for whose honour he pays. This right is not founded on the English common law, but is a provision of the general law merchant, introduced to aid the credit and circulation of bills of exchange. It extends to no other instrument. Such payment should be preceded, on the part of the payer, in the presence of a notary public, by a declaration for whose honour the bill is paid, which should be recorded by the notary, either in the protest or in a separate instrument (*a*). It is clear that there can be no payment for honour till the bill is dishonoured by non-payment (*b*); and a protest is essential (*c*), though it may be drawn out in due form afterwards (*d*).

Right of party paying *supra protest*.

A party paying a bill of exchange, *supra protest*, has his action against the party for whom the payment was made, and against all other parties to whom that party could have

(*a*) Beawes, pl. 53; Marius, 128. L'intervention et le paiement seront constatés dans l'acte de protêt ou à la suite de l'acte. Code de Commerce, Art. 158.

(*b*) *Deacon* v. *Stodhart*, 2 Man. & Gr. 317.

(*c*) In *Vandewall* v. *Tyrrell*, 1 M. & M. 87, so held by Lord Tenterden; and in *Ex parte Wylde*, 30 L. J., Bky. 10, by Lord Campbell. As it is by the French law, Code de Commerce, Art. 158, and by the law of Scotland, Bell's Comm. b. 3, part 1, c. 4, s. 867.

(*d*) *Geralopulo* v. *Wieler*, 10 C. B. 690.

resorted for reimbursement (*e*). But he thereby discharges all the subsequent parties, although that discharge does not prevent his relying on any title they may have (*f*).

Notice of dishonour by.

A man paying for honour of an indorser may, if he choose, give immediate notice to the prior indorsers, but he is not bound so to do. He may, if he please, send the protest, or the bill or notice, to the indorser for whose honour he pays, and any subsequent regular notice given by that party (*g*) will suffice.

Cannot revive liability.

It is conceived that a man cannot, by paying, *supra protest*, revive the liability of an indorser already discharged by laches.

Payment without protest.

And where a party pays generally for honour, without a protest, a bill already indorsed in blank, he, as an indorsee, may, it seems, sue any party on the bill (*h*).

Safest mode of taking up a bill for honour.

The most obvious and advantageous course to be pursued by a man desiring to protect the credit of any party to a dishonoured bill, is simply to pay the amount to the holder and take the bill as an ordinary transferee.

But the holder may possibly object; for example, the bill may not have been indorsed in blank, and the holder may refuse to indorse even *sans recours*. In such an event a payment, *supra protest*, becomes essential.

Accommodation bills.

The party paying, *supra protest*, has also his remedy against the acceptor, and that whether the acceptance was given for value or not, unless there be an equity attached to the bill amounting to a discharge (*i*).

(*e*) Bayley, 6th ed. 318.

(*f*) Celui qui paie une lettre de change par intervention est subrogé aux droits du porteur. • • • Si le paiement par intervention est fait pour le compte du tireur tous les endosseurs sont libérés. S'il est fait pour un endosseur, les endosseurs subséquents sont libérés. Code de Commerce, Art. 159. In America it is held that an acceptor, *supra protest*, for the honour of the first indorser, may require as a condition of payment, that the holder shall indorse the bill to him. See Byles on Bills, 5th American ed. 408.

(*g*) *Goodall* v. *Polhill*, 14 L. J., C. P. 146; 1 C. B. 233, S. C.

(*h*) *Mertens* v. *Winnington*, 1 Esp. 113. But see the observations on this case by Lord Campbell in *Ex parte Wylde*, 30 L. J., Bky. 10.

(*i*) *Ex parte Wackerbath*, 5 Ves. 574; *Ex parte Swan*, L. R., 6 Eq. 844, explaining and overruling *Ex parte Lambert*, 13 Ves. 179. A party taking up a bill for the honour of any party to it succeeds *to the title* of the party from whom he took it, and is in effect an indorsee by the law merchant, though he cannot himself indorse.

CHAPTER XXI.

When the protest should be made.

No payment *supra protest* of promissory notes.

It is necessary that the protest should be made before payment (*k*).

The law merchant as to payment, *supra protest*, does not extend to promissory notes, which are not, like bills of exchange, instruments calculated or intended for circulation all over the globe. Whoever, therefore, pays a note for another person without authority, express or implied, does so at his peril (*l*).

In ordinary cases, however, where the note is indorsed in blank, he of course becomes a transferee of the note.

Pothier, vol. iv. prt. 1, ss. 113, 114. "Au moyen du paiement il demeurera subrogé en tous les droits du porteur, quoiqu'il n'en ait pas de transport, subrogation ni ordre." Noguier, Lettres de Change, ss. 584—591.

(*k*) *Vandewall* v. *Tyrrell*, 1 M. & M. 87. Although it need not be drawn out in full, or extended, as it is called, till afterwards. *Geralopulo* v. *Wieler*, 10 C. B. 690.

(*l*) Story on Promissory Notes, s. 453.

CHAPTER XXII.

OF NOTICE OF DISHONOUR.

DIVISION OF THE SUBJECT 270
FORM OF THE NOTICE . 270
Description of the Instrument 275
Statement of the Party on whose behalf Notice is given 275
Notice of Protest . . 276
MODE OF TRANSMITTING IT 276
By Post 276
Direction of the Letter . 276
Evidence of Notice by Post 277
Special Messenger . . 277
How to be sent in case of Foreign Bill . . . 278
AT WHAT PLACE . . 278
WHEN TO BE GIVEN . 279
If the Parties live in different Places . . 280
In the same Place . . 281
When a Person receiving Notice should transmit it 281
May be given on the day of Dishonour . . . 282
When, if the Bill is deposited with Banker, Attorney or Agent . . 282
Notice through Branch Banks 283
Sundays and Holidays, how reckoned . . . 283
Burden of Proof . . 283
BY WHOM NOTICE SHOULD BE GIVEN . . . 284
By an Agent . . . 285
By a Pledge . . . 285
TO WHOM . . . 286
To an Agent or Attorney . 288
To a Bankrupt . . . 288
Where the Party is dead . 288
Need not be given to Acceptor 288
To Parties jointly liable . 289
To a Transferer not indorsing 289
When to a Guarantor . 290
To an Indorser giving a Bond 291
CONSEQUENCES OF NEGLECT 291
WHAT EXCUSES NOTICE . 292
Agreement of the Parties . 292
Countermand of Payment . 292
No Effects 292
Where there is reasonable Expectation that the Bill will be honoured . . 294
Ignorance of Party's residence 296
Accident 297
Where a Bill is drawn by several on one of themselves 297
Death, Bankruptcy or Insolvency will not excuse . 297
Insufficient Stamp . . 298
Note not negotiable . . 298
CONSEQUENCES OF NEGLECT, HOW WAIVED . 298
Laches not imputable to the Crown 300
Pleading where Notice is excused or waived . . 300
Evidence of Notice . . 300

IN general, it is incumbent on the holder of a bill or note dishonoured, whether by non-acceptance (*a*), or by non-pay-

(*a*) *Bleasard* v. *Hirst*, 5 Burr. 2672; *Goodall* v. *Dolley*, 1 T. R. 712. And the parties who are entitled to notice of non-acceptance,

CHAPTER XXII.

ment, to give notice of that fact to the antecedent parties. The requisites of notice and the consequences of neglect being much the same in both cases, under the general head of notice of dishonour will be considered notice of non-acceptance and notice of non-payment.

DIVISION OF THE SUBJECT.

In considering this subject, let us inquire,—first, what form of notice is required; secondly, how notice is to be transmitted; thirdly, at what place it is to be given; fourthly, at what time; fifthly, by whom it must be given; sixthly, to whom; seventhly, what are the consequences of neglect; eighthly, how notice may be excused or waived; and lastly, how it may be proved.

WHAT FORM OF NOTICE IS REQUIRED.

First, at to the form of the notice. Notice does not mean mere knowledge, but an actual *notification*. For a man who can be clearly shown to have known beforehand that the bill would be dishonoured is nevertheless entitled to notice (*b*).

No particular form of notice is required. It may be either written or oral (*c*). All that is necessary is, to apprise the party liable of the dishonour (*d*) of the bill in question, and to intimate that he is expected to pay it. And an announcement of the dishonour will (at least, if it come from the holder) amount to a sufficient intimation to the indorser, that he is held liable (*e*). But where a mere demand of payment was

are discharged for want of it, and are not liable for subsequent non-payment, *Roscow* v. *Hardy*, 12 East, 434, unless the bill come into the hands of a subsequent indorsee for value, who was not aware of the dishonour. *O'Keefe* v. *Dunn*, 6 Taunt. 305; 1 Marsh. 613, S. C.; *Dunn* v. *O'Keefe*, 5 M. & S. 282; *Whitehead* v. *Walker*, 9 M. & W. 506, S. C. See *Goodman* v. *Harvey*, 4 Ad. & El. 870; 6 N. & M. 372. Where a bill was re-indorsed to a prior indorser, and in the interval had been dishonoured by a refusal to accept, of which refusal the drawer had had no notice, it was held that the plaintiff, declaring as immediate indorsee of the drawer, the defendant might plead those facts without averring that the plaintiff gave no value, or was not again indorsee before the bill became due, or had knowledge of the facts; *Bartlett* v. *Benson*, 15 L. J., Exch. 23; 14 M. & W. 733; 3 D. & L. 274, S. C.; and if notice of non-acceptance be given, the right to recover of the prior parties the full amount of the bill immediately, however distant its maturity, is complete. *Whitehead* v. *Walker*, 9 M. & W. 506.

(*b*) See *Burgh* v. *Legge*, 5 M. & W. 418; *Caunt* v. *Thompson*, 18 L. J., C. P. 127; 7 C. B. 400, S. C.

(*c*) The construction of a parol notice is for the jury, of a written notice for the Court, and therefore, perhaps, a parol notice may be good where the same words, if in writing, might be held insufficient. See *Metcalfe* v. *Richardson*, 11 C. B. 1011; and *Phillips* v. *Gould*, 8 C. & P. 355.

(*d*) *i. e.* (in the case of dishonour by non-payment), of presentment and non-payment. *East* v. *Smith*, 16 L. J., Q. B. 292; 4 Dowl. & L. 744, S. C.

(*e*) It was held in *Furze* v.

made, the Court observed, "There is no precise form of words necessary to be used in giving notice of the dishonour of a bill of exchange, but the language used must be such as to convey notice to the party what the bill is, and that payment of it has been refused by the acceptor. Here the letter in question did not convey to the defendant any such notice; it does not even say the bill was ever accepted. We, therefore, think the notice was insufficient" (*f*). Where the attorney for the indorsee wrote a letter to the indorser to the following effect: "A bill for 683*l*., drawn by K. on J. & Co., and bearing your indorsement, has been put into our hands by A., with directions to take legal measures for the recovery thereof, unless immediately paid to us;" it was held, that this letter was not a sufficient notice of dishonour. "The notice of dishonour," says Tindal, C. J., delivering the judgment of the Court of Exchequer Chamber, "which is commonly substituted in this country in the place of a formal protest (such formal protest being essential in other countries to enable the plaintiff to recover), most certainly does not require all the precision and formality which accompanied the regular protest, for which it has been substituted. But it should at least inform the party to whom it is addressed, either in express terms or by *necessary implication* (*g*), that the bill has been dishonoured, and that

Sharwood, 2 G. & D. 116; 2 Q. B. 416, S. C., that a notice of the dishonour of a bill of exchange sent *by the holder*, need not contain an announcement, that the holder looks to the party to whom it is addressed for payment, but that if the notice do not come immediately from the holder, such an intimation may perhaps be necessary. See also *East* v. *Smith*, 16 L. J., Q. B. 292; 4 Dowl. & L. 744. The formal protest itself, for which the notice is substituted, contains no such announcement. And see *Miers* v. *Brown*, 11 M. & W. 372, where Mr. Baron Alderson says, "knowledge of dishonour obtained by communication from the holder of the bill, amounts to notice;" and the observations of Cresswell, J., in *Count* v. *Thompson*, 18 L. J., C. P. 128; 7 C. B. 400, S. C. In *King* v. *Bickley*, 2 Q. B. 419, it was held not necessary to state in a notice of dishonour, that the holder looks to the other party for payment, and that the mere sending of notice of dishonour is itself a sufficient intimation for that purpose. The following was the form of notice:—"Sir, I hereby give you notice that a bill for 50*l*., at three months after date, drawn by J. L. upon and accepted by J. E. of Blenheim-street, Chelsea, and indorsed by you, lies at No. 6, Ely Place, dishonoured. Yours, &c., (Signed) WM. KING." See *Chard* v. *Fox*, 14 Q. B. 200.

(*f*) *Hartley* v. *Case*, 4 B. & C. 339; 6 Dowl. & R. 505.

(*g*) Perhaps "reasonable intendment" would be a more correct expression than "necessary implication:" at all events the expression "necessary implication" is not to be so construed as to exclude the possibility of any other inference. See the observations of Mr. Baron Parke on this expression in *Hedger*

CHAPTER XXII.

the holder looks to him for payment of the amount. Looking at this notice, we think no such intimation is conveyed in terms, or is necessarily to be inferred from its contents." The Court further observed, that it was consistent with the notice that the bill had never been presented, but that the plaintiff intended to rely on an excuse for non-presentment, that the notice did not state that the bill was due, and might not have been intended as a notice of dishonour, but might have pre-supposed it (*h*).

v. *Steavenson*, 2 M. & W. 799; 5 Dowl. 771, S. C.; *Lewis* v. *Gompertz*, 6 M. & W. 402.

(*h*) *Solarte* v. *Palmer*, 7 Bing. 530; 5 Moo. & P. 475; 1 C. & J. 417; 1 Tyr. 371, S. C.; affirmed in the House of Lords, 1834, 1 Bing. N. C. 194, where Parke, J., declared the unanimous opinion of the Judges present, that the letter of the plaintiff's attorney did not amount to notice of the dishonour of the bill, as such a notice ought, in express terms or by necessary implication, to convey full information that the bill had been dishonoured. And Lord Brougham, C., on the ground that after *Hartley's case*, the judgment of the Exchequer Chamber, and the 5th edition of *Bayley on Bills*, the case was too clear for appeal, said that the judgment of the Court below must be affirmed, with costs. The propriety of this decision and of dismissing the appeal, with costs, as a case too clear for argument, was the subject of considerable discussion among the profession at the time. The decisions in *Hartley* v. *Case*, and *Solarte* v. *Palmer*, have been followed by no small inconvenience to the public, who are now hardly safe in giving notices of dishonour without professional aid.

The following notices have accordingly been since held *insufficient*:—

"The note for 200*l.*, drawn by H. H., dated 18th July last, payable three months after date, and indorsed by you, became due yesterday, and is returned to me unpaid. I therefore request you will let me have the amount forthwith. 'These facts,' says Tindal, C. J., 'are compatible with an entire omission to present the note to the maker.'" *Boulton* v. *Welsh*, 3 Bing. N. C. 688; 4 Scott, 425, S. C.

"Sir, A bill for 30*l.*, dated the 18th August, 1837, at three months, drawn and indorsed by R. Everett upon and accepted by W. Tuck, and indorsed by you, lies at my office due and unpaid. I am, &c., S. J. SYDNEY." *Phillips* v. *Gould*, 8 C. & P. 355.

"Messrs. Strange and Co. inform Mr. James Price that Mr. John Betterton's acceptance for 87*l.* 5*s.* is not paid. As indorser, Mr. Price is called upon to pay the money, which will be expected immediately. Swindon, Dec. 1836." *Strange* v. *Price*, 10 Ad. & El. 125; 2 Per. & Dav. 278, S. C.

"Sir, This is to inform you that the bill I took of you, 11*l.* 2*s.* 6*d.*, is not took up, and 4*s.* 6*d.* expenses; and the money I must pay immediately. My son will be in London on Friday morning. WM. MESSENGER." *Messenger* v. *Southey*, 1 Man. & Gr. 76; 1 Scott, N. R. 180, S. C.

The following notices of non-payment of six bills of exchange were held insufficient:—

1. "Sir, A bill for 29*l.* 17*s.* 3*d.*, drawn by Ward on Hunt, due yesterday, is unpaid, and I am sorry to say the person at whose house it is made payable don't speak very favourably of the acceptor's punctuality. I should like to see you upon it to-day."

It is to be observed, however, that the expressions of the Judges in *Solarte* v. *Palmer* are not the language of the

2. "Mr. Maine,—Sir, This is to give you notice that a bill drawn by you and accepted by Josias Bateman for 47*l.* 16*s.* 9*d.*, due July 19th, 1835, is unpaid, and lies due at Mr. J. Furze's, 65, Fleet-street."

3. "Sir, Mr. Howard's acceptance for 21*l.* 4*s.* 4*d.*, due on Saturday, is unpaid. He has promised to pay it in a week or ten days. I shall be glad to see you upon it as early as possible."

4. "Sir, This is to give you notice that a bill for 176*l.* 15*s.* 6*d.*, drawn by Samuel Maine, accepted by G. Clisby, dated May 7th, 1835, at four months, lies due and unpaid at my house."

5. "P. Johnson, Esq.,—Sir, This is to give you notice that a bill, 20*l.* 17*s.* 7*d.*, drawn by Samuel Maine, accepted by Richard Jones, dated May 21st, 1835, at four months, lies due and unpaid at my house."

6. "P. Johnson, Esq.,—Sir, This is to give you notice that a bill for 148*l.* 10*s.*, drawn by Samuel Maine, and accepted by G. Parker, dated May 22nd, 1835, lies due and unpaid at my house." *Furze* v. *Sharwood and Others*, 11 L. J., Q. B. 19; 2 Q. B. 388, S. C.

But the following have been held to be *sufficient* notices of dishonour:—

"Sir, a bill drawn by you upon and accepted by Mr. Joshua Watson for 31*l.* 8*s.*, due yesterday, is dishonoured and unpaid; and I am desired to give you notice thereof to request that the same may be immediately paid. I am, &c., H. D. RUSHBURY." *Woodthorpe* v. *Lawes*, 2 M. & W. 109.

"Sir, the bill for £——, drawn by you, is this day returned *with charges*, to which your immediate attention is requested." (Signed by indorsee.) *Grugeon* v. *Smith*, 6 Ad. & Ell. 499; 2 Nev. & P. 303, S. C.

"Sir, I am desired by Mr. Hedger to give you notice that a promissory note for 99*l.* 18*s.*, payable to your order two months after the date thereof, became due yesterday, and has been returned unpaid, and I have to request you will please remit the amount thereof *with* 1*s.* 6*d.* *noting*, free of postage, by return of post. I am, &c., JONES SPYER." *Hedger* v. *Steavenson*, 2 M. & W. 799; 5 Dowl. 771, S. C.

"Your bill is unpaid, *noting* 5*s.*" *Armstrong* v. *Christiani*, 5 C. B. 687.

"Your note has been returned dishonoured," is sufficient, without the words "your note has been presented for payment." *Edmonds* v. *Cates*, 2 Jurist, 183.

"Messrs Houlditch are surprised that Mr. Canty has not taken up Chaplin's bill according to his promise; are also surprised to hear that Mrs. Gib's bill was returned to the holder unpaid."

This notice was followed by a visit from the indorser to the holder on the same day, in which he promised to write to the other parties, by whom, or by himself, the bill should be paid. *Houlditch* v. *Canty*, 4 Bing. N. C. 441; 3 Scott, 209, S. C.

"Mr. Gompertz,—Sir, The bill of exchange for 250*l.*, drawn by S. Rendall, and accepted by Charles Stretton, and bearing your indorsement, has been presented for payment to the acceptor thereof, and returned dishonoured, and now lies overdue and unpaid with me, as above, of which I hereby give you notice. I am, &c., C. LEWIS." *Lewis* v. *Gompertz*, 6 M. & W. 400.

"I beg to inform you that Mr. D.'s acceptance for 200*l.*, drawn and indorsed by you, due 31st July, has been presented for payment and returned, and now re-

CHAPTER XXII.

House of Lords, and it is to be borne in mind that so far as those expressions go beyond what was necessary to decide the case then under consideration, they are extra-judicial.

mains unpaid." *Cooke* v. *French*, 10 Ad. & Ell. 131; 3 Per. & D. 596, S. C.

"Dear Sir, To my surprise I have received an intimation from the Birmingham and Midland Counties Bank that your draft on A. B. is dishonoured, and I have requested them to proceed on the same." *Shelton* v. *Braithwaite*, 7 M. & W. 436.

"Sir, I am instructed by Mr. Molineaux to give you notice that a bill (describing it) has been dishonoured," &c. *Stocken* v. *Collin*, 9 C. & P. 653; 7 M. & W. 515, S. C.

A party sent by the holder of a dishonoured bill of exchange, called at the drawer's house the day after it became due, and there saw his wife, and told her that he had brought back the bill that had been dishonoured. She said that she knew nothing about it, but would tell her husband of it when he came home. The party then went away, not leaving any written notice: held sufficient notice of dishonour. *Housego* v. *Cowne*, 2 M. & W. 348.

"James Court's acceptance, due this day, is unpaid, and *I request your immediate attention to it*," was held sufficient. *Bailey* v. *Porter*, 14 M. & W. 44. See the observations on this case in *Allen* v. *Edmundson*, 17 L. J., Exch. 293; 2 Exch. 719, S. C.; and see *Paul* v. *Joel*, 3 H. & N. 455; 28 L. J., Exch. 143; 4 H. & N. 355, affirmed in error.

"Your draft upon C. for 50*l.*, due 3rd March, is returned to us unpaid, and if not taken up this day, proceedings will be taken against you for the recovery thereof," was held sufficient. *Robson* v. *Curlewis*, 2 Q. B. 421.

"A bill, &c. is unpaid, *noting 5s.*," is sufficient, the expression *noting* indicating a dishonour. *Armstrong* v. *Christiani*, 17 L. J., C. P. 181; 5 C. B. 687, S. C.

Where the holder, when the bill became due, said to the executor of the acceptor, who was also indorser, "I have brought a bill from the plaintiffs, you know what it is;" and the defendant said, "I am executor of the drawee, you must persuade the plaintiff to let the bill stand over a few days, because the acceptor has been dead only a few days. I shall see the bill paid." Notice of dishonour was held to be proved. *Caunt* v. *Thompson*, 18 L. J., C. P. 125; 7 C. B. 400, S. C.

"We beg to acquaint you with the non-payment of William Miles's acceptance to James Wright's draft of 29th December last, at four months, 50*l.*, amounting, with expenses, to 50*l.* 5*s.* 1*d.*, which remit us in course of post without fail, to pay to Messrs. Everards & Co., Lynn," was held sufficient. *Everard* v. *Watson*, 1 E. & B. 801. In this case Lord Campbell expressed his regret at the decision of *Salarte* v. *Palmer;* and see *Paul* v. *Joel*, ante.

It is conceived that the following is the full form of notice to be given by the holder to an indorser. It may be easily altered and adapted to circumstances:—

No. 1, *Fleet-street, London, 26th Sept.* 1842.—*Sir, I hereby give you notice that the bill of exchange, dated 22nd ult., drawn by A. B. of* ——, *on C. D. of* ——, *for* 100*l. payable one month after date to A. B. or his order, and indorsed by you, has been duly presented for payment, but was dishonoured, and is unpaid. I request you to pay me the amount thereof. I am, Sir, your obedient servant, G. H.—To Mr. E. F., of* ——, (*Merchant*)."

The construction of all written instruments is for the Court, but the meaning of peculiar expres-

The decision in *Solarte* v. *Palmer* is unquestionably binding to this extent, that a notice in those very terms and under those very circumstances is bad and ought to be withdrawn from the jury. But in strictness this decision is binding no further.

Notwithstanding, therefore, the case of *Solarte* v. *Palmer*, the true rule in nearly all cases seems now to be this: that where a notice of dishonour conveys expressly or impliedly an intimation intelligible to ordinary understandings of dishonour, and of demand of payment, the notice is sufficient.

Description of the instrument.

The notice must not so misdescribe the instrument that the defendant may be led to confound it with some other. Thus, a notice in the following terms: "I give you notice, that a bill for, &c., at, &c., *drawn by you* upon, &c., lies at, &c. dishonoured," has been held insufficient to sustain an action against the *indorser*, who is not also the *drawer* (*i*). But this is only a Nisi Prius decision and doubtful. It has since been held that if there be more than one bill to which the notice may apply, it lies on the defendant to prove that fact (*k*). And if a note be improperly called a bill it is no objection (*l*), nor if a bill be improperly called a note (*m*), nor if the characters of drawers and acceptors of a bill be transposed (*n*).

In short, that a misdescription which does not mislead is immaterial (*o*), is now the rule of law, as well as of convenience and justice.

Statement of the party on whose behalf notice is given.

It has been held that notice of dishonour need not state on whose behalf payment is applied for, nor where the bill is lying (*p*), and a misdescription of the place where the bill is lying is immaterial (*q*), unless, perhaps, a tender were made there.

sions, which in particular places or trades have a known meaning, is for the jury. *Hutchison* v. *Bowker*, 5 M. & W. 542.

(*i*) *Beauchamp* v. *Cash*, 1 D. & R., N. P. C. 3. Though every indorser is in the nature of a new drawer, ante, p. 151. But see *Mellersh* v. *Rippen*, 7 Exch. 578.

(*k*) *Shelton* v. *Braithwaite*, 7 M. & W. 436.

(*l*) *Messenger* v. *Southey*, 1 Man. & Gr. 76; 1 Scott, N. R. 180, S. C.

(*m*) *Stockman* v. *Parr*, 11 M. & W. 809.

(*n*) *Mellersh* v. *Rippen*, 7 Exch. 578.

(*o*) *Bromage* v. *Vaughan*, 9 Q. B. 608; *Mellersh* v. *Rippen*, supra; *Dennistoun* v. *Stewart*, 17 Howard, American Rep. 606; *Harpham* v. *Child*, 1 F. & F. 652.

(*p*) *Woodthorpe* v. *Lawes*, 2 M. & W. 109; *Housego* v. *Cowne*, 2 M. & W. 348; *Harrison* v. *Ruscoe*, 15 L. J., Exch. 110; 15 M. & W. 231, S. C.; *Maxwell* v. *Brain*, Exch. 1866.

(*q*) *Rowlands* v. *Springett*, 14 L. J., Exch. 227; 14 M. & W. 7, S. C.

CHAPTER XXII.

If the notice, by mistake, misdescribe the party giving it, by representing that it is given by or on behalf of A., when in reality it is given by or on behalf of B., it is, nevertheless, good. But the party who receives the notice is to be placed in the same situation as if the notice had really been given by A., and is at liberty to object any inability in A. to give notice; as, for example, that A. had been discharged by *laches*, or had no right of action on the bill (*r*).

Notice of protest.

It is not necessary that *a copy* of the protest should accompany notice of the dishonour of a foreign bill (*s*). But information of the protest should be sent (*t*), if the party to whom notice is transmitted reside abroad (*u*).

MODE OF TRANSMITTING NOTICE.

Secondly. As to the mode of transmitting the notice.

By post.

Putting a letter into the post is the most common and the safest mode of giving notice. It is not necessary to prove that the letter was received, and any miscarriage will not prejudice the party giving notice (*x*). It has been ruled that, in London, delivery of a letter to a bellman in the street is not sufficient, and that it should be posted either at the General Post-Office, or at an authorized receiving-house (*y*).

Direction of the letter.

It is not sufficient that the letter be directed, generally, to a person at a large town; as, for example, to "Mr. Haynes, Bristol" (*z*), without specifying in what part of it he resides, unless where the person to whom the letter is sent is the drawer of the bill, and has dated it in an equally general manner (*a*). But if he has done so, then the send-

(*r*) *Harrison* v. *Ruscoe*, 15 L. J. Exch. 110; 15 M. & W. 231, S. C.

(*s*) *Goodman* v. *Harvey*, 4 Ad. & El. 870; 6 N. & M. 372, S. C.

(*t*) *Rogers* v. *Stephens*, 2 T. R. 713; *Gale* v. *Walsh*, 5 T. R. 239; *Brough* v. *Parkins*, 2 Ld. Raym. 993; *Cromwell* v. *Hynson*, 2 Esp. 511; *Robins* v. *Gibson*, 3 Camp. 334; 1 M. & Sel. 288, S. C.; B. N. P. 271.

(*u*) See the Chapter on PROTEST.

(*x*) *Saunderson* v. *Judge*, 2 H. Bl. 509; *Kufh* v. *Weston*, 3 Esp. 54; *Parker* v. *Gordon*, 7 East, 385; 3 Smith, 358, S. C.; *Langdon* v. *Hulls*, 5 Esp. 157; *Dobree* v. *Eastwood*, 3 C. & P. 250; *Stocken* v. *Collin*, 7 M. & W. 515; 9 C. & P. 653, S. C.; *Woodcock* v. *Houldsworth*, 16 L. J., Exch. 49; 16 M. & W. 126, S. C.; *Mackay* v. *Judkins*, 1 F. & F. 208.

(*y*) *Hawkins* v. *Rutt*, Peake's N. P. C. 186; but see *Pack* v. *Alexander*, 3 M. & Sco. 789, and *Skilbeck* v. *Garbett*, 14 L. J., Q. B. 339; 7 Q. B. 846, S. C. "A bellman," says Lord Denman, "is an ambulatory post office."

(*z*) *Walter* v. *Haynes*, R. & M. 149.

(*a*) *Mann* v. *Moors*, 1 R. & M. 249; *Clarke* v. *Harpe*, 3 M. & W.

ing of a letter, with an address as general as the drawer's description, as "T. M. Barron, Esq., London," will at least be evidence from which the jury may infer due notice (*b*). If the notice to the drawer arrive too late, through misdirection, it is for the jury to say, whether the holder used due diligence to discover the drawer's address (*c*). If the notice miscarry from the indistinctness of the drawer's handwriting on the bill, he will not be discharged (*d*).

Evidence of notice by post.

Where a witness said that the letter, containing notice of dishonour, was put on a table to be carried to the post-office, and that by the course of business all letters deposited on this table were carried to the post-office by a porter, Lord Ellenborough said, "You must go further; some evidence must be given that the letter was taken from the table in the counting-house and put into the post-office. Had you called the porter and he had said that, although he had no recollection of the letter in question, he invariably carried to the post-office all the letters found upon the table, this might have done (*e*), but I cannot hold this general evidence of the course of business, in the plaintiff's counting-house, to be sufficient" (*f*). The post marks in town or country, proved to be such, are evidence that the letters, on which they are, were in the office to which those marks belong, at the time of the dates of such marks (*g*). But they are not conclusive evidence (*h*).

A duplicate original, or an examined copy, or oral evidence of a written notice of dishonour, are admissible without notice to produce the original (*i*).

Special messenger.

Though there be a general post, the holder may send

166; 1 Hor. & H. 35, S. C.; *Siggers* v. *Browne*, 1 Moo. & Rob. 520; *Burmester* v. *Barron*, 17 Q. B. 828.

(*b*) Ibid.

(*c*) Ibid.; see *Esdaile* v. *Sowerby*, 11 East, 114.

(*d*) *Hewitt* v. *Thompson*, 1 Moo. & Rob. 543.

(*e*) So held in *Skilbeck* v. *Garbett*, 14 L. J., Q. B. 388; 7 Q. B. 846, S. C.

(*f*) *Hetherington* v. *Kemp*, 4 Camp. 194; *Hawkes* v. *Salter*, 4 Bing. 715; 1 Moo. & P. 750, S. P.; and see *Hagedorn* v. *Reid*, 3 Camp. 379; 1 M. & S. 567, S. C.

(*g*) *Kent* v. *Lowen*, 1 Camp. 177; *Fletcher* v. *Braddyl*, 3 Stark. 64; *Rex* v. *Plumer*, R. & R. C. C. 254; *Rex* v. *Watson*, 1 Camp. 215; *Langdon* v. *Hulls*, 5 Esp. 156; *Rex* v. *Johnson*, 7 East, 65.

(*h*) *Stocken* v. *Collin*, 7 M. & W. 515; 9 C. & P. 653, S. C.

(*i*) *Ackland* v. *Pierce*, 2 Camp. 601; *Roberts* v. *Bradshaw*, 1 Stark. 28; *Kine* v. *Beaumont*, 3 B. & B. 288; 7 Moore, 112, S. C.; *secus* as to a notice of the dishonour of a bill, not being the bill sued on; *Lanauze* v. *Palmer*, 1 Moo. & Mal. 31.

CHAPTER XXII.

notice by a special messenger (*k*): but if the notice be not communicated by the special messenger till after the day when it would have been conveyed by the post, it is insufficient (*l*). Where the communication by the post is infrequent, as where the party to whom notice is to be sent lives out of the usual course of the post, so that a letter may, possibly, not reach him for a fortnight, he may be charged a reasonable sum by the holder for the expense of a special messenger (*m*).

Personal service of a written notice is not necessary (*n*).

How to be sent in case of foreign bill.

In the case of a foreign bill, it is sufficient to send it by the first regular ship bound for the place to which it is to be sent; and it is no objection that, if sent by a chance ship, bound elsewhere, it would have arrived sooner. "It is sufficient for a party in India," says Eyre, C. J., "to send notice by the first regular ship going to England, and he is not bound to accept the uncertain conveyance of a foreign ship."—"It was enough to do so by the first ship, whether English or foreign, that was going to England in the regular course of conveyance" (*o*).

We have already seen, in what cases a copy or notice of the protest must accompany notice of the dishonour of a foreign bill.

AT WHAT PLACE.

Thirdly, as to the place at which notice is to be given.

A notice of dishonour should regularly be sent to the place of business, or to the residence of the party for whom it is designed (*p*).

(*k*) *Dobree* v. *Eastwood*, 3 C. & P. 250.

(*l*) *Darbishire* v. *Parker*, 6 East, 3; 2 Smith, 195, S. C. It has been held, that it may arrive later during business hours in the same day without discharging the indorser. *Bancroft* v. *Hall*, Holt's N. P. C. 476.

(*m*) *Pearson* v. *Crallan*, 2 Smith, 404.

(*n*) *Housego* v. *Cowne*, 2 M. & W. 348.

(*o*) *Muilman* v. *D'Eguino*, 2 H. Bl. 565.

(*p*) It has been held in America that notice put into the post-office, if the parties live in different places, is good. It is otherwise when the parties reside in the same town.

Where a person has a dwelling-house and counting-room in the same town, a notice sent to either place is sufficient.

The holder of a bill or note has a right to adopt a private conveyance instead of the mail for the receipt and transmission of notice to a drawer or indorser of the dishonour thereof; but in such case it is incumbent on the holder to show that due diligence was used.

If a party receive notice of the dishonour of a bill in due time, he cannot object to the mode of conveyance. See 5th American ed. of Byles on Bills, p. 421.

If a party, whose name is on a bill, direct a notice to be sent to him when absent at a distance from his residence, so that its transmission thither, and thence to the prior parties, will occupy more time than if the notice had passed through the ordinary place of residence, a notice to him at the substituted and more distant place will, it seems, not only be a good notice as against him, but also a good notice as against prior parties (*q*).

A message sent to a counting-house within the usual hours of business has been held sufficient, though no person be in attendance. Thus, where the holder sent to a counting-house, and the messenger knocked at the outer door on two successive days, making noise sufficient to be heard by persons within, Lord Ellenborough said (*r*): "The counting-house is a place where all appointments respecting the business, and all notices, should be addressed; and it is the duty of the merchant to take care that a proper person be in attendance. It has, however, been argued, that notice in writing left at the counting-house, or put into the post, was necessary, but the law does not require it, and with whom was it to be left? Putting a letter into the post is only one mode of giving notice; but, where both parties are residing in the same town, sending a clerk is a more regular and less exceptionable mode" (*s*). But the mere act of going and knocking at the door will not sustain an allegation of actual notice, though it may enlarge the time necessary for giving it, or under some circumstances be evidence of a dispensation (*t*). A message left at the dwelling-house of a private person with his wife has been held sufficient (*u*).

WHEN TO BE GIVEN.

Fourthly, as to the time *when* notice of dishonour should be given.

The general rule is, that notice must be given before action brought within a reasonable time after the dishonour; and that what is a reasonable time is a question of law, depending on the facts of each particular case (*x*). Accordingly, the due interval within which notice may or must be

(*q*) *Shelton* v. *Braithwaite*, 8 M. & W. 252.

(*r*) But this case was decided before *Solarte* v. *Palmer*, and when the form of pleading made it unnecessary to distinguish between actual notice and a dispensation with notice.

(*s*) *Cross* v. *Smith*, 1 M. & S. 545; *Goldsmith* v. *Bland*, Chit. 10th ed. 319; Bayley, 6th ed. 276; *Bancroft* v. *Hall*, Holt's N. P. C. 476.

(*t*) *Allen* v. *Edmundson*, 2 Exch. 719.

(*u*) *Housego* v. *Cowne*, 2 M. & W. 348.

(*x*) *Darbishire* v. *Parker*, 6 East, 3; 2 Smith, 195, S. C.

CHAPTER XXII.

given, in a variety of conjunctures, has been defined by the decisions.

Where the parties live in different places.

Where the holder, and the party to whom notice is addressed, live at different places, it is sufficient to send off notice on the day next after the day of dishonour. "It is," says Abbott, C. J., "of the greatest importance to commerce that some plain and precise rule should be laid down, to guide persons in all cases, as to the time within which notice of the dishonour of bills must be given. That time I have always understood to be, the departure of the post on the day following that in which the party receives intelligence of the dishonour. If, instead of that rule, we are to say that the party must give notice by the next practicable post, we should raise, in many cases, difficult questions of fact, and should, according to the different local situations of parties, give them more or less facility in complying with the rule. But no dispute can arise from adopting the rule which I have stated" (*y*).

If the post does not go out on the next day, notice need not be posted till the day after, or till the next post-day. Thus, where the plaintiff received intelligence of the dishonour on Thursday morning, at nine o'clock, though the post did not go out till nine o'clock at night, and no bag was made up on the Friday, but the plaintiff wrote on Saturday, Lord Tenterden said, "It suffices, in this case, that the plaintiff put the letter into the post on Saturday, for, if he had done so on the Friday, it would not have been forwarded till the Saturday night, and it is immaterial whether the letter lay in the post-office or in the plaintiff's hands till the Saturday" (*z*). So, if the post goes out at an unseasonable hour in the morning, the holder is not bound to get up and write by the second post, but may wait for

(*y*) *Williams* v. *Smith*, 2 B. & Ald. 496.

It is held in America that notice of non-acceptance or non-payment must be given in a reasonable time in order to charge the drawer or indorser. Though, in some cases, the question of what is reasonable notice has been left to the jury to decide; yet the vast current of American cases holds, with remarkable unanimity, that it is a matter of law for the determination of the Court exclusively. The holder is bound to give notice of the dishonour of a bill to the parties to be charged by the next practicable mail. Where a bill drawn in that country on Europe has been dishonoured, notice must be sent by the first ship bound to any port of the United States; and it is not sufficient to send it by the first ship for the port where the drawer and indorser reside. See Byles on Bills, 5th American ed. p. 425.

(*z*) *Geill* v. *Jeremy*, Moo. & M. 61.

the third. Thus, where a bill was dishonoured on Saturday in a place where the post went out at half-past nine in the morning, it was held that it was sufficient notice of dishonour to send a letter by the following Tuesday morning's post (*a*).

In the same place.

Where both the parties live in the same town, or where they live in London (*b*), notice must be given in time to be received in the course of the day following the day of dishonour (*c*). And, therefore, though a letter be put into the post in London on the day after the dishonour, it will not be sufficient notice, unless posted in time to be delivered the same day. Lord Ellenborough: "Where the parties reside in London, each party should have a day to give notice. The holder of a bill is not, ***omissis omnibus aliis negotiis***, to devote himself to giving notice of its dishonour. If you limit a man to a fractional part of a day, it will come to a question how swiftly the notice can be conveyed,—a man and horse must be employed, and you will have a race against time. But here a day has been lost. The plaintiff had notice himself on the Monday, put in the letter on Tuesday afternoon, and the defendant does not receive notice till the Wednesday. If a party has an entire day, he must send off his letter conveying the notice within post-time of that day. The plaintiff only wrote the letter to the defendant on the Tuesday. It might as well have continued in his writing-desk on the Tuesday night, as lie at the post-office (*d*). A person who puts the letter into the post on the day when it ought to be received, must show affirmatively that it was posted in time to be received on that day (*e*). The post-mark is not conclusive evidence of the time when a letter is posted" (*f*).

When a party, receiving notice, must transmit it.

A party receiving notice of dishonour need not transmit it till the next post after the day on which he himself

(*a*) *Hawkes* v. *Salter*, 4 Bing. 715; 1 Moo. & P. 750; *Bray* v. *Hadwen*, 5 M. & Sel. 68; *Wright* v. *Shawcross*, 2 B. & Ald. 501, n.

(*b*) I am not aware that the precise extent of the word London, as here used, has been defined by any decision, nor that it has been held incumbent on a person giving notice of dishonour to treat all persons living within the limits of what was formerly the twopenny post, as living in the same place.

(*c*) *Scott* v. *Lifford*, 9 East, 347; 1 Camp. 246, S. C.; *Smith* v. *Mullett*, 2 Camp. 208; *Marsh* v. *Maxwell*, 2 Camp. 210, n.; *Jameson* v. *Swinton*, 2 Camp. 374; 2 Taunt. 224, S. C.; *Hilton* v. *Fairclough*, 2 Camp. 633; *Haynes* v. *Birks*, 3 Bos. & Pul. 599; *Williams* v. *Smith*, 2 B. & Ald. 500; *Fowler* v. *Hendon*, 4 Tyrw. 1002.

(*d*) *Smith* v. *Mullett*, 2 Camp. 208.

(*e*) *Fowler* v. *Hendon*, 4 Tyrw. 1002.

(*f*) *Stocken* v. *Collin*, 7 M. & W. 515; 9 C. & P. 653, S. C.

CHAPTER XXII.

receives the notice (*g*), although there should be no post on the next day.

May be given on the day of dishonour.

It has been doubted (*h*) whether, seeing that the acceptor of an inland bill has, as in the case of other debts, the whole of the day on which the bill falls due to pay it, notice of non-payment *can* be given till the day after. But it is now settled that notice may be given, at any time after demand on the day the bill becomes due. "The other party," observes Lord Ellenborough, "cannot complain of the extraordinary diligence used to give him information" (*i*).

Notice of dishonour may be given on the same day, though there be no actual refusal, if the house where the bill is payable be shut up and no one be there (*j*).

When, if bill is deposited with banker, attorney or agent.

A banker with whom a bill is deposited to receive payment is, for the purpose of notice, to be considered as a distinct holder, and has a day to give notice to his customer, and the customer another day to give notice to the antecedent parties (*k*). Upon the same principle, where the holder of a bill employed an attorney to give notice to an indorser, and the attorney wrote to another professional man, requesting him to ascertain the indorser's residence, and received an answer to his letter conveying the desired information, on the 16th of the month, which information he communicated to his principal on the 17th, and on the 18th forwarded the letter containing the notice of dishonour, it was held sufficient. "If," says Lord Tenterden, "the notice had been sent to the principal, he would have been bound to give notice on the next day, but it having been sent to the agent, he was not bound to give notice on the following day. A banker who holds a bill for a customer is not bound to give notice of dishonour on the day on which the bill is dishonoured. He has another day, and, upon the same principle, I think the attorney in this case was entitled, by law, to be allowed a day to consult his client" (*l*).

(*g*) *Geill* v. *Jeremy*, Moo. & M. 61.

(*h*) *Leftley* v. *Mills*, 4 T. R. 170.

(*i*) *Burbridge* v. *Manners*, 3 Camp. 193; *Ex parte Moline*, 19 Ves. 216; *Hume* v. *Peploe*, 8 East, 169; *Hine* v. *Allely*, 4 B. & Ad. 624; 1 N. & M. 433, S. C.

(*j*) *Hine* v. *Allely*, 4 B. & Ad. 624; 1 N. & M. 433, S. C.

(*k*) *Robson* v. *Bennett*, 2 Taunt. 388; *Langdale* v. *Trimmer*, 15 East, 291; *Bray* v. *Hadwen*, 5 M. & Sel. 68.

(*l*) *Firth* v. *Thrush*, 8 B. & C. 387; 2 Man. & Ry. 259; Dans. & L. 151, S. C. See, however, *In re Leeds Banking Company*, 1 Law Rep., Eq. 1; 35 L. J., Ch. 33. But in this case the prior decisions were not brought under the notice of the Vice-Chancellor.

Where a bill passes through several branch banks of the same establishment, each branch may be considered as a distinct holder entitled to receive and transmit notice as such (*m*).

Notice through branch banks.

Bank Holidays

Sunday, Christmas Day, Good Friday, a public thanksgiving or fast day, or any festival on which a man is forbidden by his religion to transact any secular affairs (for the law merchant respects the religion of different people), is not to be reckoned, in computing the time within which notice of dishonour should be given (*n*). If a man receive a letter containing notice of dishonour on such a day, he is not bound to open it, and will be considered as having received notice on the next day.

Sundays and holidays, how reckoned.

8 1824.
Bank Holiday
Act 1871

It lies on the plaintiff to show that notice was given in due time and before action brought. In an action by the indorsee against an indorser of a bill of exchange, a witness stated that, either two or three days after the dishonour of the bill, notice was given by letter to the defendant; notice in two days being in time, but notice on the third too late. Lord Ellenborough: "The witness says two or three days, but the third day would be too late. It lies upon you to show that notice was given in due time, and I cannot go upon probable evidence without positive proof of the fact. Nor can I infer due notice from the non-production of the letter; the only consequence is, that you may give parol evidence of it. The *onus probandi* lies upon the plaintiff, and, since he has not proved due notice, he must be nonsuited" (*o*). So it lies on the plaintiff to show that notice was given and received before action brought. Therefore, where the notice was given and the action brought on the same day, the plaintiff was nonsuited, because he did not show by affirmative evidence that the notice was received before the writ issued (*p*).

Burden of proof.

When the party to whom notice should be given cannot be found, the time is extended (*q*).

(*m*) *Corlett* v. *Jones*, Exch. 1842; *Clode* v. *Bayley*, 12 M. & W. 51. And so held, although the bill may have passed by delivery without indorsement. Ibid. See further as to branch banks, *Woodland* v. *Fear*, 7 E. & B. 519.

(*n*) 39 & 40 Geo. 3, c. 42; 7 & 8 Geo. 4, c. 15; *Lindo* v. *Unsworth*, 2 Camp. 602; *Tassell* v. *Lewis*, 1 Ld. Raym. 743.

It is held in America that bills of exchange payable in Massachusetts are properly protested on the day preceding the fast day, if they fall due on that day. See Byles on Bills, 5th American ed. p. 429.

(*o*) *Lawson* v. *Sherwood*, 1 Stark. 314.

(*p*) *Castrique* v. *Bernabo*, 14 L. J., Q. B. 3; 6 Q. B. 498, S. C.

(*q*) See post.

CHAPTER XXII.

Each indorser has a day to transmit notice.

When there are several indorsers, the time within which each is entitled to notice of dishonour depends on the parties by whom and to whom the notice is given, and will therefore be more conveniently discussed after we have considered the parties who are to give and receive notices.

BY WHOM NOTICE SHOULD BE GIVEN.

Fifthly, we are to consider by whom the notice ought to be given.

The object of notice is twofold: first, to apprise the party to whom it is addressed of the dishonour; and, secondly, to inform him that the holder, or party giving the notice, looks to him for payment (*r*). Hence it follows that notice can only be given by some party to the instrument, though he need not be the *actual holder* of the bill at the time (*s*), but that a stranger is incompetent to give it (*t*). And it has been held by Lord Eldon, that notice by the first indorsee, who had not himself received notice from the second indorsee, and who was not, therefore, obliged to take back the bill, was insufficient as between the second indorsee and the drawer (*u*). And it seems clear, that even a party to the bill, who has been already discharged by laches, or who could not in any event sue, is incompetent to give notice (*x*). But a prior indorsee who has himself received due notice may transmit it (*y*), though he may not know that the bill has been dishonoured (*z*). And notice by the holder, or by a party who is liable to be sued and may be entitled to sue,

(*r*) *Tindal* v. *Brown*, 1 T. R. 167.

(*s*) *Chapman* v. *Keane*, 3 Ad. & E. 193; 4 N. & M. 607, S. C.; *Harrison* v. *Ruscoe*, 15 L. J., Exch. 110; 15 M. & W. 231, S. C.; *Lysaght* v. *Bryant*, 19 L. J., C. P. 160; 9 C. B. 46, S. C.

(*t*) *Stewart* v. *Kennett*, 2 Camp. 177.

It has been held in America that notice must be given by, or by the authority of, a party or one who on the return of the bill to him would have a right of action on it.

A written notice, not signed by any person, of the dishonour of a bill, and sent by mail to an indorser, is insufficient to hold him. He who accepts or pays *supra protest*, must give the same notice, in order to charge a party, which is necessary to be given by other holders. There is the same necessity for notice of non-acceptance, &c. when a bill is paid for the honour of one of the parties as in other cases. See the 5th American ed. of Byles on Bills, p. 480.

(*u*) *Ex parte Barclay*, 7 Ves. 597; but *quære*, since the case of *Chapman* v. *Keane*, 3 Ad. & E. 193; 4 N. & M. 607, S. C.; unless the party giving the notice had been already discharged by laches.

(*x*) *Harrison* v. *Ruscoe*, 15 L. J., Exch. 110; 15 M. & W. 231, S. C. See post; and see *Miers* v. *Brown*, 11 M. & W. 372.

(*y*) *Jameson* v. *Swinton*, 2 Camp. 373; 2 Taunt. 224, S. C.; *Wilson* v. *Swabey*, 1 Stark. 34.

(*z*) *Jennings* v. *Roberts*, 24 L. J., Q. B. 102; 4 E. & B. 615, S. C.

will enure to the benefit of all antecedent or subsequent parties. So that a notice by the last indorsee to the drawer will operate as a notice from each indorser to the drawer; and if the payee or first indorsee has duly received notice, or has not been discharged by laches, a notice by him to the drawer will be equivalent to a notice from each indorser, and from the holder to the drawer (*a*). And a notice from an intermediate party may, in pleading, be described as a notice from the plaintiff (*b*).

There are two *Nisi Prius* cases (*c*) to be found in the books, in which Lord Kenyon and Lord Ellenborough are reported to have held respectively, that notice of dishonour from the acceptor himself was equivalent to notice by the holder. But it is conceived, that in those cases the holder must have constituted the acceptor his agent for the purpose of giving notice, or that they are not law, being at variance with the general principle laid down in *Tindal* v. *Brown*, and recognized in a variety of subsequent cases (*d*).

Notice of dishonour is not invalid because the person giving it did not know that the bill had been dishonoured. If a bill is dishonoured in fact, and a party to it unequivocally asserts that fact in a notice of dishonour, it is sufficient (*e*).

By an agent.

Notice of dishonour may be given by any agent who holds the bill as a banker or attorney, and in the agent's own name (*f*). And it has been held, that a notice given by a party to a bill in the name of an indorser, but without his authority, is good (*g*).

But a tradesman's foreman or servant is not necessarily such an agent as can give a good notice (*h*).

By a pledgee.

A creditor who holds a bill as a collateral security is

(*a*) Bayley, 6th ed. 251.

(*b*) *Newen* v. *Gill*, 8 C. & P. 367.

(*c*) *Shaw* v. *Croft*, Chit. 9th ed. 494; Selw. 9th ed. 332; *Rosher* v. *Kieran*, 4 Camp. 87.

(*d*) See *Baker* v. *Birch*, 3 Camp. 107; *Pickin* v. *Graham*, 1 C. & M. 725; 3 Tyrw. 923, S. C.; *Harrison* v. *Ruscoe*, 15 L. J., Exch. 110; 15 M. & W. 231, S. C. The case of *Tindal* v. *Brown*, however, so far as it authorizes the conclusion that the party giving notice must be the *actual holder*, is now overruled; *Chapman* v. *Keane*, 3 Ad. & E. 193; 4 N. & M. 607, S. C.

(*e*) *Jennings* v. *Roberts*, 4 E. & B. 615.

(*f*) *Woodthorpe* v. *Lawes*, 2 M. & W. 109; *Rowe* v. *Tipper*, infra. As to the effect of a misdescription of his principal by the agent, see ante, as to the form of notice.

(*g*) *Rogerson* v. *Hare*, 1 Jur. 1.

(*h*) *East* v. *Smith*, 16 L. J., Q. B. 292; 4 D. & L. 744, S. C.

In America it has been held that

CHAPTER XXII.

bound to present and give notice of dishonour, and is liable for the consequences if he omit to do so (*i*).

TO WHOM.

Sixthly, to whom notice is to be given.

Each indorser is entitled to notice. The drawer of a bill payable to a third party is also entitled to notice. The drawee or acceptor is not entitled, nor is the maker of a promissory note.

It is the safest course for the holder to give notice himself to all the parties against whom he may wish to proceed within the time within which he is, by law, required to give it to his immediate indorser (*j*); for, if he merely give notice to his immediate indorser, and it be not regularly transmitted to the antecedent parties, they are discharged; and, even if it be so transmitted, the evidence required to trace the notice back to a remote party is more voluminous, and may be difficult to procure. But if, where there are several indorsements, notice of the dishonour be given by the holder to his immediate indorser, and to him only, but an unbroken chain of notices, each given in due time, hang regularly from indorsee to indorser, back to a distant indorser or to the drawer, the latter is liable either to his indorser or to the holder. Thus, where all the parties lived in London, and the holder on the day of dishonour gave notice to the fifth indorser, and the fifth on the following day to the fourth, he on the day after to the third, the third on the next day to the second, and the second on the following day to the first, it was held, in an action by the second against the first indorser, that due notice had been given (*k*). And it would also have been sufficient in an action, by the holder at the time of dishonour, against the fifth indorser, and in an action by the fifth indorser against the first (*l*). But, if there be any *laches* in the circulation of the notice back through the several parties, even though the neglect of one be compensated by the extraordinary diligence of another, *laches* once committed discharges all the antecedent parties, and subsequent notices

a bank, having a bill for the purpose of collection only, is considered the real holder for the purpose of making demand and giving notice. It is not necessary that notice should be given by the holder; if given by any person authorized by the holder, it is sufficient. See 5th American ed. of Byles on Bills, p. 432.

(*i*) *Peacock* v. *Pursell*, 14 C. B. N. S. 728; 32 L. J., C. P. 266, S. C.

(*j*) *Rowe* v. *Tipper*, 13 C. B. 249.

(*k*) *Hilton* v. *Shepherd*, 6 East. 14, n.

(*l*) *Smith* v. *Mullett*, 2 Camp. 208; *Marsh* v. *Maxwell*, 2 Camp. 210; *Jameson* v. *Swinton*, 2 Camp. 373; 2 Taunt. 224, S. C.; *Wilson* v. *Swabey*, 1 Stark. 34.

are invalid, for they are given by parties who are no longer liable on the bill (*m*). "It is not enough that the drawer or indorser receives notice in as many days as there are subsequent indorsers, unless it is shown that each indorsee gave notice within a day after receiving it; as, if any one has been beyond the day, the drawer and prior indorsers are discharged" (*n*). Nor can a party, in such a case, by waiving his own discharge, waive the discharge of antecedent parties. Defendant was the eighth, plaintiff the eleventh, indorser of a bill. The instrument passed through several subsequent hands, was dishonoured at maturity, and returned to the immediate indorsee of the plaintiff. It remained in his hands three days, and then the plaintiff paid it, and gave notice to the defendant, who received the notice in a shorter interval from the day of dishonour than would have elapsed had each party through whose hands the bill was returned taken the full time allowed by law for giving notice. Abbott, C. J.: "In this case the plaintiff was clearly discharged by the *laches* of the holder. Then can he, by paying the bill, place the prior indorsers in a worse situation than that in which they would otherwise have been? I think he cannot do so,

(*m*) *Harrison* v. *Ruscoe*, 15 L. J., Exch. 10; 15 M. & W. 231, S. C.

(*n*) Per Lord Ellenborough, in *Marsh* v. *Maxwell*, 2 Camp. 210, n.; *Smith* v. *Mullett*, 2 Camp. 208. See *Rowe* v. *Tipper*, 13 C. B. 249.

In America, also, it is held that, where there are several successive indorsers of a bill of exchange or promissory note, whether the indorsements be upon actual negotiation for value, or for the purpose of collection only, the holder may send notice of dishonour to his immediate indorser; and if that indorser, after receiving such notice, give reasonable notice to his immediate indorser, the latter is liable to his immediate indorsee, though he does not receive notice so soon as if it were transmitted to him by the holder immediately upon the dishonour. And so of every successive indorser.

Each party has a full day to give notice; but the over-diligence of one shall not be made to supply the under diligence of another.

Notice of a protest of a bill may be transmitted through the several indorsers to the drawer; and though the route may be circuitous and delay be occasioned, yet such notice, sent with due diligence throughout, will render the drawer and all the indorsers liable.

A notice given by the holder to the several indorsers enures to the benefit of the indorsers or preceding parties, so that the first indorser who has received notice of its nonpayment from the holder, but not from the second indorser, is liable to the second indorser, in the same manner as though notice had been received from him.

An agent of the holder is allowed one day to give notice to his principal of a default, and the principal is entitled to one day, after he receives notice, to give or forward notice by mail to the drawer or indorser.

Neglect to give notice to the first indorser does not discharge a subsequent indorser who had notice. See Byles on Bills, 5th American ed. p. 434.

CHAPTER XXII.

and that in paying this bill he has paid it in his own wrong, and cannot be allowed to recover upon it against the defendant" (*o*).

To an agent or attorney.

As notice may be given by leaving it at the counting-house, so notice to an agent for the general conduct of business is sufficient notice to the principal (*p*). But notice to a man's attorney or solicitor is not sufficient (*q*). A verbal message left at the drawer's house with his wife has been held sufficient. "A person, not a merchant," says Bolland, B., "who draws a bill of exchange, undertakes to have some one at his house to answer any application that may be made respecting it when it becomes due" (*r*).

To a bankrupt.

If the drawer of a bill become bankrupt, notice must nevertheless be given to him, at all events, before the choice of assignees. If the assignees are appointed, perhaps notice should be given to them (*s*). If the bankrupt have absconded there being as yet no assignees, and a messenger be in possession, notice should be given to the messenger, and to the petitioning creditor (*t*).

Where the party is dead.

If the party be dead, notice should be given to his personal representatives (*u*).

Need not be given to acceptor.

Where a bill is accepted payable at a particular place, it is not necessary, in an action against the acceptor, to have given him notice of the dishonour. "Bills of exchange,"

(*o*) *Turner* v. *Leach*, 4 B. & Ald. 451.

(*p*) *Crosse* v. *Smith*, 1 M. & Sel. 545.

(*q*) Ibid.

(*r*) *Housego* v. *Cowne*, 2 M. & W. 348.

(*s*) *Ex parte Moline*, 19 Ves. 216; *Rhode* v. *Proctor*, 4 B. & C. 517; 6 D. & Ry. 610, S. C.; *Ex parte Johnson*, 3 Deac. & Chitty, 433; 1 Mont. & Ayr. 622; *Ex parte Chappell*, 3 M. & Ayr. 490; 3 Dea. 298, S. C.

(*t*) So in Scotland notice must be given to the party who represents the estate. (Thomp. 535.)

(*u*) I am aware of no actual English decision to this effect. But it has been so decided in America. And if there be no personal representatives, a notice sent to the residence of the deceased party's family is sufficient. *Merchants' Bank* v. *Birch*, 17 John's Rep. 25; Bayley, American ed. 418.

It has also been held in America that the administrator of an indorser, appointed before the maturity of the note, who has given due notice of his appointment, is entitled to notice. A notice addressed through the mail in due time to the "legal representative" of A., deceased, the indorser, to the last residence of the deceased, is sufficient, though it does not appear that the administrator or executor ever received it. See 5th American ed. of Byles on Bills, p. 436.

says Abbott, C. J., "of late years have been made payable by the acceptor, either at the houses of his friends or agents, they being expressly named in the acceptance, or at banking houses, or at houses merely described by their number in a certain street. It is most convenient that the same rule should be laid down as applicable to all these cases. The most plain and simple rule to lay down is this: that the effect of an acceptance in any of these forms, is a substitution of the house, banker, or other person therein mentioned, for the house or residence of the acceptor, and, consequently, that the presentment at the house, or to the party named in the acceptance, is equivalent to presentment at the house of the acceptor. This rule will, I think, be equally applicable to the case of every acceptance, and will be convenient and advantageous to the public" (*x*). *A fortiori*, it is unnecessary to have given the acceptor such a notice in any action against the drawer (*y*).

To parties jointly liable.

Where partners are jointly liable on the bill, notice to one is sufficient (*z*).

To a transferer, not indorsing.

If a man, not a party to a bill, assign without indorsement, he is not entitled to notice of dishonour (*a*).

(*x*) *Treacher* v. *Hinton*, 4 B. & Ald. 413; *Smith* v. *Thatcher*, 4 B. & Ald. 200; *Pearse* v. *Pemberthy*, 3 Camp. 261.

(*y*) *Edwards* v. *Dick*, 4 B. & Ald. 212.

(*z*) *Porthouse* v. *Parker*, 1 Camp. 83; *Bignold* v. *Waterhouse*, 1 M. & Sel. 259. But it is conceived that notice to a private member of a joint stock banking company would not suffice. See *Powles* v. *Page*, 3 C. B. 16; *In re Carew*, 31 Beav. 39.

It is held in America that joint owners of a note, who jointly indorse the same, do not thereby constitute themselves partners quoad hoc, so that notice of the dishonour of a bill to one will charge both. Both must have notice.

Where a partnership indorses a note, notice of its dishonour given to a surviving partner is sufficient to bind the legal representatives of the deceased partner, although the holder knew of the decease of such partner before the maturity of the note. See Byles on Bills, 5th American ed. p. 437.

Mr. Justice Story doubts whether, in the case of joint parties not partners, notice to one only would bind even him. Story on Promissory Notes, p. 36.

(*a*) *Van Wart* v. *Woolley*, 3 B. & C. 439; 5 D. & R. 374; M. & M. 520, S. C.; *Swinyard* v. *Bowes*, 5 M. & Sel. 62. But a notice has been held to be in time, although an allowance be made for its transmission through a party not indorsing. See *Clode* v. *Bayley*, 12 M. & W. 51.

And it has been held in America that a party who purchases a bill and transmits it on account of goods ordered by him, without indorsing it, is not entitled to notice of its dishonour. See 5th American ed. of Byles on Bills, p. 438.

CHAPTER XXII.

And, as a general rule, a man transferring by delivery without indorsement a bill or note payable *to bearer* is not entitled to notice.

We have already seen (*b*), that a transferer by mere delivery of a negotiable instrument made or become payable to bearer, is not in general liable, either on the instrument, or on the consideration. He, therefore (unless in some excepted cases), requires no notice of dishonour.

But we have also seen, that if the bill or note payable to bearer were delivered on account of a pre-existing debt that delivery is not, *primâ facie*, a sale of the bill or note. On dishonour, therefore, of the bill or note, the liability of the transferer for the original debt revives. But in such a case the transferee will have made the bill or note his own, unless he have given due notice of dishonour.

And we have further seen, that as there may be an express contract that the instrument shall not amount to payment, if dishonoured, so there are many circumstances from which a jury may infer, that the intention and understood contract of the parties was, that the instrument was not to be payment, if dishonoured (*c*).

It is conceived, that in all cases where, in consequence of the dishonour of bills or notes, made or become payable to bearer, a remedy arises on the consideration, the transferer is entitled to notice of dishonour (*d*).

When to a guarantor.

A man merely guaranteeing the payment of a bill, but not a party to it, is not discharged by the neglect of the holder

(*b*) Ante, Chapter on TRANSFER.

(*c*) "If a person," says Abbott, C. J., "deliver a bill to another, without indorsing his own name upon it, he does not subject himself to the obligations of the law merchant; he cannot be sued on the bill, either by the person to whom he delivers it, or by any other. And, as he does not subject himself to the obligations, we think he is not entitled to the advantages. If the holder of a bill sell it without his own indorsement, he is, generally speaking, liable to no action in respect of the bill. If he deliver it without his indorsement upon any other consideration, antecedent or concomitant, the nature of the transaction and all circumstances regarding the bill must be inquired into, in order to ascertain whether he is subject to any responsibility. If the bill be delivered, and received as an absolute discharge, he will not be liable; if otherwise, he may be. The mere fact of receiving such a bill, does not show it was received in discharge." *Van Wart* v. *Woolley*, 3 B. & C. 445.

(*d*) There is great confusion in the cases on this subject, but the authorities are canvassed in the judgment of Mr. Justice Coleridge, in *Turner* v. *Stones*, 1 Dowl. & L. 181. That learned judge says "I think the obligation on the holder is to give notice promptly to the party from whom he receives the note."

to give him notice of dishonour, unless he has been actually prejudiced by such neglect (*e*).

To an indorser giving a bond.

And though a man indorse a bill, yet if he also give a bond conditioned for its payment, absence of due notice of dishonour is no plea to an action on the bond (*f*).

CONSEQUENCES OF NEGLECT.

Let us now inquire, seventhly, what are the consequences of neglect to give due notice. The law presumes that, if the drawer has not had due notice, he is injured, because, otherwise, he might have immediately withdrawn his effects from the hands of the drawee, and that, if the indorser has not had timely notice, the remedy against the parties liable to him is rendered more precarious. The consequence, therefore, of neglect of notice is, that the party to whom it should have been given is discharged from all liability, whether on the bill or on the consideration for which the bill was paid (*g*).

The old doctrine on this subject was, that it lay on the defendant to prove that he had been injured by the want of notice (*h*); but it is now settled that the want of notice is a complete defence, and that evidence tending to show the defendant was not prejudiced by the neglect is inadmissible, except in an action against the drawer who had no effects in the hands of the drawee (*i*). And if a man who is discharged for want of notice, nevertheless pays the bill, he cannot recover against prior parties. But where an agent drew a bill on his principal for goods bought by the agent for the principal, and the bill was dishonoured, of which the agent had no notice, but the agent, being afterwards arrested on the bill, paid it, and sued his principal on the contract of indemnity, which the law implies in favour of the agent in such cases; it was held, that the agent's not having insisted on the absence of notice as a defence to the action against himself, did not preclude him from recovering the amount of the bill against his principal (*k*).

(*e*) *Warrington* v. *Furbor*, 8 East, 242; 6 Esp. 89, S. C.; *Philips* v. *Astling*, 2 Taunt. 206; *Swinyard* v. *Bowes*, 5 M. & S. 62; *Holbrow* v. *Wilkins*, 1 B. & C. 10; 2 D. & Ry. 59, S. C.; *Van Wart* v. *Woolley*, 3 B. & C. 439; 5 Dowl. & R. 374; M. & M. 220, S. C.; *Walton* v. *Mascall*, 13 M. & W. 72; *Hitchcock* v. *Humfrey*, 5 M. & Gr. 559.

(*f*) *Murray* v. *King*, 5 B. & Ald. 165.

(*g*) *Bridges* v. *Berry*, 3 Taunt. 130.

(*h*) *Mogadara* v. *Holt*, 1 Show. 317; 12 Mod. 15, S. C.

(*i*) *Dennis* v. *Morrice*, 3 Esp. 158; *Hill* v. *Heap*, D. & R., N. P. C. 59.

(*k*) *Huntley* v. *Sanderson*, 1 C. & M. 467; 3 Tyr. 469, S. C.

CHAPTER XXII.

But eighthly, and lastly, there are cases in which notice is excused or waived.

WHAT EXCUSES NOTICE.

Agreement of the parties.

Notice may be dispensed with and excused by a prior agreement on the part of the party otherwise entitled to it, that it shall not be necessary to give him notice. Thus, where the drawer stated to the holder a few days before the bill became due that he would call and see if the bill had been paid by the acceptor, it was held that he had dispensed with notice (*l*).

Countermand of payment.

Where the drawer has countermanded payment, notice of dishonour to him is dispensed with, although it may be still necessary to present (*m*).

Absence of effects in drawee's hands.

If the drawer had no effects at any time during the currency of the bills in the hands of the acceptor, and will have no remedy against the acceptor or any other person if he be obliged to pay the bill, he cannot, in general, have been prejudiced by want of notice, and, therefore, cannot set that up as a defence (*n*). But this decision, substituting knowledge for notice, has been much regretted. "I have always thought," says Abbott, C. J., "that it would have been better never to have considered knowledge as equivalent to notice: I cannot consent to carry the law 'one step further" (*o*). Therefore it has been held, that, in order to be liable without notice, the drawer must have had no remedy against the acceptor or any other person. Hence, if a bill be drawn for the accommodation, not of the drawer, but of the acceptor, as the drawer might sue the acceptor he is entitled to notice (*p*). And if the drawer in such a case chooses to pay without notice, he cannot sue the acceptor for *money paid* to his use, although he may sue on the bill (*q*). And where a bill was drawn for the accommodation of an indorsee, and neither such indorsee nor the drawer had any

(*l*) *Phipson* v. *Kneller*, 4 Camp. 285; 1 Stark. 116, S. C.; see *Burgh* v. *Legge*, 5 M. & W. 418; and *Brett* v. *Levett*, 13 East, 214; but see *Ex parte Bignold*, 1 Deac. 728; *Murray* v. *King*, 5 B. & Ald. 165; *Soward* v. *Palmer*, 2 Moore, 274; 8 Taunt. 277, S. C.

(*m*) *Hill* v. *Heap*, D. & R., N. P. C. 57; *Prideaux* v. *Collier*, 2 Stark. 57.

(*n*) *Bickerdike* v. *Bollman*, 1 T. R. 406; see *Lafitte* v. *Slatter*, post; *Carew* v. *Duckworth*, L. R., 4 Ex. 313.

(*o*) *Cory* v. *Scott*, 3 B. & Ald. 619; *Carter* v. *Flower*, 16 M. & W. 749.

(*p*) *Ex parte Heath*, 2 Ves. & B. 240; 2 Rose, 141, S. C.; *Cory* v. *Scott*, 3 B. & Ald. 619; Bayley, 294, 5th ed.; *Sleigh* v. *Sleigh*, 19 L. J., Exch. 345; 5 Exch. 514, S. C.

(*q*) *Sleigh* v. *Sleigh*, 19 L. J., Exch. 345; 5 Exch. 514, S. C.

effects in the hands of the acceptor, it was held that a subsequent indorsee, in order to recover against the drawer, was bound to give him notice, for the drawer had a remedy over against his immediate indorsee (*r*). So, it is no excuse for neglect of notice *to an indorser*, that the drawer had no effects in the acceptor's hands. "That circumstance," says Lord Kenyon, "will not avail the plaintiff,—the rule extends only to actions brought against the drawer; the indorser is in all cases entitled to notice, for he has no concern with the accounts between the drawer and the drawee" (*s*). Nor will the absence of effects in the hands of the maker of a *promissory note* be any excuse for want of notice to the indorser, at all events unless the indorser be the person who is to pay, and who has no remedy over against any one (*t*); nor will it suffice to allege that he has not been damnified by the absence of notice. An intimation from the drawee that he cannot meet the bill, but that the drawer must take it up, will not relieve the holder from the necessity of giving the drawer notice (*u*). But if the acceptor give the drawer money for that purpose, such sum is recoverable from the drawer by the holder, as money paid to his use (*x*). Though the acceptor, at the time of dishonour, have no effects of the

(*r*) *Norton* v. *Pickering*, 8 B. & C. 610; 3 Man. & R. 23; Dans. & L. 210, S. C.; *Cory* v. *Scott*, 3 B. & Ald. 619, overruling *Walwyn* v. *Quintin*, 1 B. & P. 652; and see *Brown* v. *Maffey*, 15 East, 216; *Ex parte Heath*, 2 Ves. & B. 249; 2 Rose, 141, S. C.

It is held in America that the indorser of a promissory note for the accommodation of the drawer, is entitled to strict notice.

The maker of a note for the accommodation of the payee is not released by the failure to protest the note and give him notice, though it is known to the holder that he is an accommodation maker.

An accommodation drawer of a bill of exchange is entitled to notice of its dishonour, although he had no funds in the hands of the drawee.

An indorser is chargeable without notice, if he indorsed for the drawer's accommodation only, and had no expectation that the drawee would pay. See Byles on Bills, 5th American ed. p. 442.

And the indorser is entitled to notice, although the bill were drawn and accepted, and indorsed by him for the purpose of raising funds for a company in which he as well as the holder was a shareholder. *Maltass* v. *Siddle*, 6 C. B., N. S. 494.

(*s*) *Wilks* v. *Jacks*, Peake, 202. But if the indorser have had funds put into his hands by the drawer, out of which he is to pay the bill, notice to the indorser is unnecessary. *Corney* v. *Mendez da Costa*, 1 Esp. 302; *Carter* v. *Flower*, 16 M. & W. 751.

(*t*) *Carter* v. *Flower*, 16 M. & W. 751.

(*u*) *Stables* v. *O'Kines*, 1 Esp. 332.

(*x*) *Baker* v. *Birch*, 3 Camp. 107.

CHAPTER XXII.

drawer in his hands, yet, if he ever had any after the drawing of the bill, or if, without effects, the drawer had any reasonable ground for expecting that the bill would be honoured, he is entitled to notice. "The case of *Bickerdike* v. *Bollman*," says Lord Ellenborough, "went upon the ground, that the drawer had no effects in the hands of the drawee *at the time of the bill drawn*, and the other cases followed on the same ground. But no case has gone the length of extending the exemption further to cases where the drawee had effects of the drawer in his hands at the time of the bill drawn, though the balance might vary afterwards, and be turned into the opposite scale. When there are no effects of the drawer in the hands of the drawee at the time when the bill is drawn, the drawer must know that he is drawing on accommodation; but, if he have effects at the time, it would be very dangerous and inconvenient, merely on account of the shifting of a balance, to hold notice not to be necessary. It would be introducing a number of collateral issues in every case upon a bill of exchange, to examine how the account stood between the drawer and the drawee, from the time the bill was drawn down to the time it was dishonoured" (*y*). Where the drawer had goods in the hands of drawees to the amount of 1,500*l.* but owed them 10,000*l.*, and the drawees had appropriated the goods to the satisfaction of the debt, it was held, that notice of dishonour to the drawer was still essential. Lord Ellenborough observing,—"If a man draws upon a house with whom he has no account, he knows that the bill will not be accepted; he can suffer no injury from want of notice of its dishonour; and, therefore, he is not entitled to such notice. But the case is quite otherwise where the drawer has a fluctuating balance in the hands of the drawee. There notice is peculiarly requisite. Without this, how can the drawer know that credit has been refused him, and that his bill had been dishonoured? It is said here, that the effects in the hands of the drawees were all appropriated to discharge their own debt; but that appropriation should appear by writing (*z*), and the defendant should be a party to it" (*a*).

Where there is reasonable expectation that the bill will be honoured.

And, in general, though the drawer had no effects in the hands of the drawee, yet, if he had any reasonable expecta-

(*y*) *Orr* v. *Maginnis*, 7 East, 359; 2 Smith, 328, S. C.; *Legge* v. *Thorpe*, 12 East, 171; *Brown* v. *Maffey*, 15 East, 216; *Hammond* v. *Dufrene*, 3 Camp. 145; *Thackray* v. *Blackett*, 3 Camp. 164.

(*z*) *Quære*, as to the necessity of a writing.

(*a*) *Blackhan* v. *Doren*, 2 Camp. 503.

tion that the bill would be honoured, he is entitled to notice of dishonour, as if he have consigned goods to the drawee, though, in fact, they never came to hand, or have accepted bills for him (*b*). So where R., being indebted to the drawer, represented to him that A. owed him money, and the drawer in consequence drew a bill on A., which A. accepted, but did not pay, it was held, that the drawer was entitled to notice of dishonour; for he had reason to expect either that R. would take up or that the acceptor would pay the bill, and might by want of notice be induced to relax in his endeavours to procure payment of the debt owing by R. (*c*). But the drawer of a bill, who has no effects in the hands of the drawee, except that he has supplied him with goods on credit, which credit does not expire till long after the bill becomes due, is not entitled to notice, for the goods are not such as can properly be set against the drawing, nor can there be any reasonable expectation that the bill will be paid till the expiration of the credit (*d*).

(*b*) *Legge* v. *Thorpe*, 12 East, 171; *Rucker* v. *Hiller*, 16 East, 43; 3 Camp. 217, S. C.; *Spooner* v. *Gardiner*, 1 R. & M. 84; *Walwyn* v. *St. Quintin*, 1 Bos. & Pul. 652; *Ex parte Heath*, 2 Ves. & B. 240.

(*c*) *Lafitte* v. *Slatter*, 6 Bing. 623; 4 M. & P. 457, S. C. The burthen of proving that the defendant has been injured by receiving no notice, where that is alleged, but where it is proved that he had no funds in the hands of the acceptor, lies on the defendant. *Fitzgerald* v. *Williams*, 6 Bing. N. C. 68; 8 Scott, 271, S. C.

(*d*) *Claridge* v. *Dalton*, 4 M. & Sel. 226. As to the form of the allegation in pleading, see *Thomas* v. *Fenton*, 16 L. J., Q. B. 362; 5 D. & L. 28, S. C.

It is held in America that if the drawer had no effects in the hands of the drawee at the date of the bill, and no reasonable ground to expect it would be honoured, he is chargeable without notice.

The drawer is entitled to notice of the dishonour of a bill, if he had reasonable ground to believe it would be honoured, although he had no funds in the drawee's hands.

Though the drawer has no funds in the hands of the drawee, and no ground to expect the bill to be honoured, yet the indorser is entitled to notice in all cases, unless he has received funds from the drawer to take up the bill. An indorser of a promissory note, who, before the note falls due, takes an assignment of all the property and estate of the maker for the express purpose of meeting his responsibilities, is not entitled to the usual notice of non-payment.

The mere taking of security by an indorser from the maker of the note does not dispense with a demand and notice, unless sufficient funds have come into his hands to satisfy the note, or all the property of the maker has been transferred to the indorser.

The burthen of proof is on the holder of a bill to show that the drawer had no funds in the drawee's hands in order to excuse want of notice.

Where the indorser has discharged the maker of a note from liability by a settlement and re-

CHAPTER XXII.

If the drawer of a bill make it payable at his own house, this is evidence to go to the jury that it is a bill drawn for the accommodation of the drawer himself, of the dishonour of which it is not necessary to apprize him. "I cannot understand," says Lord Tenterden, "why the drawer should with his own hand make the bill payable at his own house, unless he was to provide payment of it when at maturity" (*e*).

Ignorance of party's residence.

Ignorance of a party's residence will excuse neglect to give notice of dishonour, so long as that ignorance continues without neglecting to use the ordinary means for acquiring information. "It would be very hard," observes Lord Ellenborough, "when the holder of a bill does not know where the indorser is to be found, if he lost his remedy by not communicating immediate notice of the dishonour of the bill, and I think the law lays down no such rigid rule. The holder must not allow himself to remain in a state of passive and contented ignorance: but, if he uses reasonable diligence to discover the residence of the indorser, I conceive that notice given as soon as this is discovered, is due notice of the dishonour of the bill, within the usage and custom of merchants" (*f*). Where the holder, in order to discover the residence of the indorser, had merely made inquiries at a certain house where the bill was made payable, Lord Ellenborough said, "Ignorance of the indorser's residence may excuse the want of due notice, but the party must show that he has used reasonable diligence to find it out. Has he done so here? How should it be expected that the requisite information should have been obtained where the bill was payable? Inquiries might have been made of the other

lease, a notice of non-payment would be of no use to him, and therefore he is not entitled to it. See the authorities in Byles on Bills, 5th American ed. p. 445.

(*e*) *Sharp* v. *Bailey*, 9 B. & C. 44; 4 M. & R. 4, S. C. *Quære*, whether notice of dishonour be necessary, where the drawer dies before maturity, and an indorser is sued who is the drawer's executor. See *Caunt* v. *Thompson*, 18 L. J., C. P. 127; 7 C. B. 400, S. C.

(*f*) *Bateman* v. *Joseph*, 2 Camp. 463; 12 East, 433, S. C.; *Browning* v. *Kinnear*, Gow, 81; *Harrison* v. *Fitzhenry*, 3 Esp. 240; *Baldwin* v. *Richardson*, 1 B. & C. 245; 2 D. & R. 285, S. C. In this last case the traveller of a tradesman received in the course of business a promissory note, which was afterwards dishonoured. The principal not knowing the address of the next preceding indorser, wrote to his traveller to inquire into it, and several days elapsed before he received an answer. He then gave notice, and it was held sufficient. See *Chapcott* v. *Curlewis*, 2 Moo. & Rob. 484.

persons whose names appeared on the bill, and application might have been made to persons of the same name with the defendant, whose addresses are set down in the Directory" (*g*). Due diligence has, however, been held to be a question of fact (*h*). After the residence of the party is discovered, the holder has the same time to give notice as he would have had in the first instance (*i*).

In case of accident.

Nemo ad impossibile tenetur; and, therefore, it should seem, on general principles, that the death or dangerous illness of the holder or his agent, or other accident not attributable to the holder's negligence, rendering notice impossible, may excuse it (*k*). But, where an indorser left home on account of the dangerous illness of his wife, at a distance, and a letter containing notice of dishonour of a bill lay unopened at his shop during his absence, till after the proper time for giving his indorser notice, Lord Ellenborough held, that these circumstances afforded no excuse for the delay (*l*).

Of bills drawn by several on one of themselves.

Where a bill is drawn by several persons upon one of themselves, since the acceptor is likewise a drawer, notice of dishonour is superfluous, as the dishonour must be known to one of them, and the knowledge of one is the knowledge of all (*m*).

Death, bankruptcy and insolvency of drawee.

The death, bankruptcy or insolvency of the drawee, however notorious, constitute no excuse for neglect of notice (*n*). Nor an agreement or understanding between the parties,

(*g*) *Beveridge* v. *Burgis*, 3 Camp. 262.

(*h*) *Bateman* v. *Joseph*, 12 East, 433; 2 Camp. 463, S. C.; *Hilton* v. *Shepherd*, 6 East, 14, n.; *Siggers* v. *Browne*, 1 M. & Rob. 520; *Hewitt* v. *Thompson*, 1 M. & Rob. 543. In these two last cases, the letters containing notice of dishonour had miscarried, and the jury were directed to consider whether the generality or indistinctness of the description which the defendant had given of himself in the bill, had led the plaintiff into error.

(*i*) *Firth* v. *Thrush*, 8 B. & C. 387; 2 M. & R. 359; Dans. & L. 151, S. C.; *Allen* v. *Edmundson*, 17 L. J., Exch. 291; 2 Exch. 719, S. C.; *Dixon* v. *Johnson*, 1 Jur., N. S. 70.

(*k*) Poth. 144; Pardessus du Contrat de Change, 426; Thompson, 483, 548.

(*l*) *Turner* v. *Leech*, Chit. 9th ed. 330.

(*m*) *Porthouse* v. *Parker*, 1 Camp. 82. But in case of fraud a different rule would prevail. *Bignold* v. *Waterhouse*, 1 M. & Sel. 259. And it may be doubtful how far this rule would hold in the case of a joint stock company.

(*n*) *Russel* v. *Langstaffe*, Doug. 497; *Esdaile* v. *Sowerby*, 11 East, 114; *Boultbee* v. *Stubbs*, 18 Ves. 21; but see 3 Bro. C. C. 1.

CHAPTER XXII.

that the instrument shall not be payable till after a certain event (*o*).

Where stamp insufficient.

Notice of dishonour need not be given if the bill be on an insufficient stamp (*p*).

Note not negotiable.

Nor to the indorser of a promissory note not negotiable (*q*).

CONSEQUENCES OF NEGLECT, HOW WAIVED.

The consequence of neglect of notice will be waived by a subsequent promise to pay. And a payment of part, or an acknowledgment of liability (*r*), though after action brought (*s*), will be *evidence* of notice (*t*).

It makes no difference that such promise, payment or acknowledgment, were made under a misapprehension of the *law*, for every man must be taken to know the law (*u*); otherwise, a premium is held out to ignorance, and there is no telling to what extent this excuse might be carried (*x*). But, if the promise or acknowledgment be made under a misapprehension of *fact*, as, if the bill have been presented for acceptance, and acceptance have been refused, a promise to pay, in ignorance of that circumstance, is no waiver of the consequence of *laches* (*y*). But a promise to pay will entirely dispense with proof of presentment or notice, and will throw on the defendant the double burthen of proving *laches*, and that he was ignorant of it (*z*). Where it is only

(*o*) *Free* v. *Hawkins*, 8 Taunt. 92; 1 Moore, 28, S. C.

(*p*) *Cundy* v. *Marriott*, 1 B. & Ad. 696.

(*q*) *Plimley* v. *Westley*, 2 Bing. N. C. 249; 2 Scott, 423; 1 Hodges, 324, S. C.

(*r*) *Vaughan* v. *Fuller*, 2 Stra. 1246; *Horford* v. *Wilson*, 1 Taunt. 12; *Lundy* v. *Robertson*, 7 East, 231; 3 Smith, 225, S. C.; *Brett* v. *Levett*, 13 East, 213; *Wood* v. *Brown*, 1 Stark. 217; *Hopes* v. *Alder*, 6 East, 16, n.; *Dennis* v. *Morrice*, 3 Esp. 158; *Rogers* v. *Stephens*, 2 T. R. 713; *Dixon* v. *Elliott*, 5 C. & P. 437; *Margetson* v. *Aitken*, 3 C. & P. 338; Dans. & L. 157, S. C.; *Lecaan* v. *Kirkman*, 6 Jur., N. S. 17.

(*s*) *Hopley* v. *Dufresne*, 15 East, 275.

(*t*) Many of the cases, cited below, fail in drawing the proper distinction between the effect of a promise, as a *waiver* of notice, and its effect as *evidence* of notice.

(*u*) Or, more correctly speaking, ignorance of the law cannot excuse.

(*x*) *Bilbie* v. *Lumley*, 2 East, 469.

(*y*) *Goodall* v. *Dolley*, 1 T. R. 712; *Blesard* v. *Hurst*, 5 Burr. 2672; *Williams* v. *Bartholomew*, 1 B. & P. 326; *Stevens* v. *Lynch*, 2 Camp. 333; 12 East, 38, S. C.

(*z*) *Taylor* v. *Jones*, 2 Camp. 105; *Stevens* v. *Lynch*, 12 East, 38; 2 Camp. 332, S. C. See instances of promises held insufficient in *Dennis* v. *Morrice*, 3 Esp. 158; *Cumming* v. *French*, 2 Camp. 106, n.; and see *Rouse* v.

as to part of the sum, the plaintiff can only avail himself of it as a waiver, *pro tanto*. A drawer of a bill for 200*l*., who had not received due notice of dishonour, said, "I do not mean to insist on want of notice, but I am only bound to pay you 70*l*." Abbott, C. J.: "The defendant does not say that he will pay the bill, but that he is only bound to pay 70*l*. I think the plaintiff must be satisfied with the 70*l*." (*a*). The acknowledgment or promise may be made by the attorney for the defendant, or by his clerk, who has the management of the case (*b*). It need not be made to the plaintiff, but may be made to another party to the bill, or to a stranger (*c*). A promise to pay made by the drawer in expectation that a bill will be dishonoured, but before it is dishonoured, does not dispense with notice; for it is to be understood as a promise on condition that due notice is given (*d*).

It seems, however, in some recent cases to have been considered, that a promise to pay is only evidence from which a jury may presume that a notice has been received (*e*). But that is not so. A promise to pay, if made before the time for giving notice has expired, is a dispensation; if made after that time it is a waiver, independently of any question of actual notice (*f*).

Though a party may waive the consequence of *laches*, in

Redwood, 1 Esp. 156; *Standage* v. *Creighton*, 5 C. & P. 406; and *Borradaile* v. *Lowe*, 4 Taunt. 93, where it is said that an indorser can only be rendered liable by an express promise; and see *Pickin* v. *Graham*, 1 Cro. & Mee. 725; 3 Tyr. 923, S. C.

(*a*) *Fletcher* v. *Froggatt*, 2 C. & P. 569.

(*b*) *Standage* v. *Creighton*, 5 C. & P. 406.

(*c*) *Potter* v. *Rayworth*, 13 East, 417; *Gunson* v. *Metz*, 1 B. & C. 193; 2 D. & Ry. 334, S. C.; *Fletcher* v. *Froggatt*, 2 C. & P. 569. In *Rabey* v. *Gilbert* it was held that suffering judgment by default in an action at the suit of a second indorsee was evidence of notice or of a waiver of notice in an action by the first indorsee, *Rabey* v. *Gilbert*, 30 L. J., Exch. 171; 6 H. & N. 536, S. C.

(*d*) *Pickin* v. *Graham*, 1 C. & M. 725; 3 Tyr. 923, S. C.; and see *Prideaux* v. *Collier*, 2 Stark. N. P. C. 57, and *Baker* v. *Birch*, 3 Camp. 107.

(*e*) *Hicks* v. *The Duke of Beaufort*, 4 Bing. N. C. 229; 5 Scott, 598, S. C.; and see *Booth* v. *Jacobs*, 3 Nev. & M. 351; *Pickin* v. *Graham*, 1 Cro. & Mee. 728; 3 Tyr. 923, S. C.; but see *Lundie* v. *Robertson*, 7 East, 231; 3 Smith, 225, S. C.; *Haddock* v. *Bury*, 7 East, 236, n.; *Anson* v. *Bayley*, B. N. P. 276; *Hopley* v. *Dufresne*, 15 East, 275; *Norris* v. *Solomonson*, 4 Scott, 257; where the defendant said he had no intention but to pay the bill, and should not avail himself of the informality of the notice, held evidence to go to the jury of notice. *Bromwell* v. *Bonney*, 1 Q. B. 39.

(*f*) *Cordery* v. *Colville*, 32 L. J., C. P. 211; 14 C. B., N. S. 374, S. C.; *Woods* v. *Dean*, 32 L. J., Q. B. 1; 3 Best & Smith, 101, S. C.

CHAPTER XXII.

respect of himself, he cannot do so in respect of antecedent parties (*g*).

Laches not imputable to the Crown.

No *laches* can be imputed to the Crown, and, therefore, if a bill be seized under an extent before it is due, the neglect of the officer of the Crown to give notice of the dishonour will not discharge the drawer or indorser (*h*).

Pleading where notice is excused or waived.

A prior dispensation with notice, as absence of effects, must be specially alleged in the declaration (*i*). So must the impossibility of giving notice, or any other excuse for not giving it (*k*). And a subsequent promise, when used as a waiver of notice, must also be specially pleaded (*l*). But a subsequent promise to pay, when used as evidence of the fact of notice, need not (*m*).

Evidence of notice.

After the bill is due, a promise to pay, or a part payment (*n*), or the offer of it (*o*), or any admission of liability (*p*), whether before or after the period for giving notice has expired, is *primâ facie* evidence of notice; but though there be no evidence to repel the inference, the jury are not *bound* to draw it (*q*). A letter from the defendant, containing no promise of payment, but merely an ambiguous allusion to the bill being dishonoured, was held sufficient to warrant the jury in finding that the defendant had received due notice of dishonour (*r*). And the sending a person by the defendant, the drawer, to a remote indorsee two days after the bill had become due, to inform him that he, the drawer, had been defrauded of the bill, and that he should defend any action upon it, was left by Lord Tenterden to the jury as evidence to prove notice of dishonour (*s*). And

(*g*) *Roscow* v. *Hardy*, 12 East, 434; *Turner* v. *Leach*, 4 B. & Ald. 451; *Marsh* v. *Maxwell*, 2 Camp. 210, n.; and see ante, p. 215.

(*h*) West on Extents, 28–9.

(*i*) *Cory* v. *Scott*, 3 B. & Ald. 624; *Burgh* v. *Legge*, 5 M. & W. 418.

(*k*) *Allen* v. *Edmundson*, 17 L. J., Exch. 291; 2 Exch. 719, S. C.

(*l*) *Cordery* v. *Colville*, ubi sup.

(*m*) *Lundie* v. *Robertson*, 7 East, 231; *Gibbon* v. *Coggon*, 2 Camp. 188. See post, Chapter on PLEADING.

(*n*) *Horford* v. *Wilson*, 1 Taunt. 12.

(*o*) *Dixon* v. *Elliott*, 5 C. & P. 437.

(*p*) *Jackson* v. *Collins*, 17 L. J., Q. B. 142; *Mills* v. *Gibson*, 16 L. J., C. P. 249; *Rabey* v. *Gilbert*, 6 H. & N. 586.

(*q*) *Bell* v. *Frankis*, 11 L. J., C. P. 300; 4 M. & G. 446, S. C.

(*r*) *Booth* v. *Jacobs*, 3 Nev. & M. 351.

(*s*) *Wilkins* v. *Jadis*, 1 Moo. & R. 41; and see *Curlewis* v. *Corfield*, 1 Q. B. 814.

a statement by the defendant that he should pay the bill, and not avail himself of the *informality* of the notice, has been held to be evidence of *due* notice (*t*). And a conditional promise to pay, although the condition be not complied with, is still evidence (*u*).

Notice to produce a notice of dishonour is not necessary (*x*).

(*t*) *Bronwell* v. *Bonney*, 1 Q.B. 39.

(*u*) *Campbell* v. *Webster*, 15 L. J., C. P. 4; 2 C. B. 258, S. C.; but see *Pickin* v. *Graham*, 1 C. & M. 725; 3 Tyr. 923, S. C.

(*x*) *Swain* v. *Lewis*, 2 C., M. & R. 261. See *Doe* v. *Somerton*, 14 L. J., Q. B. 210.

Tyler v Yates to go in. 11 Ex 265

CHAPTER XXIII.

OF INTEREST.

The Nature of Interest . 302
From what Time it runs when payable by the Terms of the Instrument 303
From what Time it runs when not made payable by the Terms of the Instrument . . . 303
From what Time it runs as against an Indorser . 304
To what Period it is computed 304
When Money is paid into Court 304
In Trover 305
After a Tender . . . 305
How Bankers should charge it on Checks . . . 305
Recovery of Interest after Receipt of the Principal. 305
When Interest is not recoverable 305
When an Engagement to give a Bill will create a Liability to Interest . 305
Liability of a Guaranteeing Party to Interest . 305
How Interest is recovered . 306
The Rate of Interest . . 306
Indebitatus Count . . . 306
USURY 306
At Common Law . . 307
Statutes against it . . 307
Their Construction . . 307
Substance of Enactments . 307
There must be a Loan . 308
Usury on Discounts . . 308
Usurious Security for Good Debt 309
Where the Charge is not for the Loan but for the Labour 310
There must be a corrupt Intention . . 311
Hazard of the Principal Money 311
Advance of Goods . . 312
Irish, Colonial or Foreign Interest 312
Substituted Security . . 313
Separate Instruments. . 314
Innocent Indorsee . . 314
Statutes exempting certain Bills and Notes from the Usury Laws . . . 314
Total Repeal of the Usury Laws 316
Pleading 316

CHAPTER XXIII.

Its nature.

INTEREST, where not made payable on the face of the instrument (*a*), is in the nature of damages for the retention of the principal debt.

The general rule of the common law is, that interest is

(*a*) But if interest be payable by the terms of the instrument, it is recoverable, not as damages but as a debt. *Watkins* v. *Morgan*, 6 C. & P. 661; *Hudson* v. *Fossett*, 13 L. J., C. P. 141; 7 M. & G. 348, S. C. So if there be a collateral agreement to pay a particular rate of interest, *Florence* v. *Jennings*, 26 L. J. 275; 1 C. B., N. S. 584, S. C. As to payment of principal, in full of both principal and interest, see ante, p. 227.

not recoverable unless there were an express stipulation (*b*) that interest should be paid, or unless such be the usage of trade. Bills and notes, by the usage of trade, carry interest from the time of maturity; but a jury are not bound, unless they see fit, to give more than nominal interest, or, indeed, any interest at all (*c*).

And now, by the recent statute for the amendment of the law (*d*), interest is recoverable on all debts payable by virtue of a written instrument, at a time certain, and on all other debts after a *written* demand, and notice that interest will be claimed from the date of the demand; but it is discretionary with the jury to give or withhold it.

From what time it runs when payable by the terms of the instrument.

Interest is seldom expressly made payable on the face of the instrument, but sometimes it is so.

Where interest is expressly made payable on the face of the instrument, it carries interest from its date, and not merely from its maturity. For unless the words "bearing interest," or other words of similar import, are taken to mean that interest is payable from the date of the instrument, they would be idle, since without any such words the owner of the bill or note would be entitled to interest from its maturity. Thus it has been held, that on a bill drawn payable at a certain period after date *bearing interest*, the plaintiff is entitled to recover interest from the date of the bill (*e*). So where a note was made payable on demand with lawful interest, it was held to carry interest from the date (*f*). So a promissory note, whereby the maker promised to pay, one year after his death, 300*l.* with legal interest, bears interest from the date of the note (*g*).

From what time it runs when not made payable by the terms of the instrument.

Where interest is not expressly made payable by the terms of the instrument, it runs from the maturity of the

(*b*) If, at the time of a contract of sale, the vendee agrees to pay by bill or note, and neglects to do so, interest is recoverable as part of the price. *Marshall* v. *Poole*, 13 East, 98; *Davis* v. *Smyth*, 8 M. & W. 399.

(*c*) *Keene* v. *Keene*, 27 L. J., C. P. 88; 3 C. B., N. S. 144, S. C. See *Cameron* v. *Smith*, 2 B. & A. 305; 5 Taunt. 626; *In re Burgess*, 2 Moore, 745; *Ex parte Williams*, 1 Rose, 399; *Ex parte Cooks*, ibid. 317; *Lowndes* v. *Collins*, 17 Vesey, 27; *Lithgow* v. *Lyan*, 1 Coop. C. C. 29. See post, p. 305.

(*d*) 3 & 4 Will. 4, c. 42, ss. 28, 29. See *Taylor* v. *Stott*, 34 L. J. Exch. 1.

(*e*) *Kennerly* v. *Nash*, 1 Stark. 452; *Doman* v. *Dibden*, 1 R. & M. 381; *Richards* v. *Richards*, 2 B. & Ad. 447.

(*f*) *Weston* v. *Tomlinson*, Chitty, 9th ed. 681; *Hopper* v. *Richmond*, 1 Stark. 507.

(*g*) *Roffey* v. *Greenwell*, 10 Ad. & E. 222; 2 Per. & Dav. 365, S. C.

CHAPTER XXIII.

bill or note. If the bill or note, not expressly made payable with interest, be payable on demand, interest runs, not from the date of the instrument, but from the time of the demand (*h*).

Where there has been no demand except the action, interest may be given from the service of the writ of summons (*i*).

As against an indorser.

The indorser of a bill or note has been held liable to pay interest only from the time that he receives notice of the dishonour. "The drawer cannot," says Mansfield, C. J., "find out by inspiration who is the holder, and till he finds that out he cannot pay the bill. When he has found out who is the holder, he is bound to pay the bill within a reasonable time. If he does not, he is liable to damages for not performing his contract: those damages are the interest on the bill" (*j*).

To what period it is computed.

Interest was formerly computed only to the commencement of the suit, but it is now carried down to final judgment. "That," says Lord Mansfield, "does the plaintiff complete justice. It is agreeable to the principles of the common law, and interferes with no statute. It takes from the defendant the temptations to make use of all the unjust dilatories of chicane. For, if interest is to stop at the commencement of a suit, where the sum is large, the defendant may gain by protracting the cause in the most expensive and vexatious manner, and the more the plaintiff is injured, the less he will be relieved" (*k*).

When money is paid into court.

Where money is paid into court on a security carrying interest, interest must be paid, not merely to the commencement of the action, but to the time of payment into court (*l*), or the plaintiff may proceed in the action for the difference (*m*).

(*h*) *Blaney* v. *Hendricks*, 2 Bla. 761; *Cotton* v. *Horsemanden*, Prac. Reg. 357; and see *Barough* v. *White*, 4 B. & C. 327; 6 D. & Ry. 379; 2 C. & P. 8, S. C.; *Parker* v. *Hutchinson*, 3 Ves. 134; *King* v. *Taylor*, 5 Ves. 808; *Lithgow* v. *Lyan*, 1 Coop. 29; *Lowndes* v. *Collins*, 17 Ves. 27.

(*i*) *Pierce* v. *Fothergill*, 2 Bing. N. C. 167; 2 Scott, 334, S. C.

(*j*) *Walker* v. *Barnes*, 5 Taunt. 240; 1 Marsh. 36, S. C.

It is held in America that it is error to calculate interest on the damages allowed in a protested bill of exchange from the maturity of the bill. See 5th American edition of Byles on Bills, p. 457.

(*k*) *Robinson* v. *Bland*, 2 Burr. 1077.

(*l*) *Mercer* v. *Jones*, 3 Camp. 477.

(*m*) *Kidd* v. *Walker*, 2 B. & Ad. 705.

In trover.

But in trover the rule formerly was that the plaintiff is entitled to damages equal to the value of the article converted *at the time of the conversion.* And, therefore, in trover for bills or notes, interest was only calculated down to the time of conversion. But now by the 3 & 4 Will. 4, c. 42, the jury may give damages over and above the value of the goods at the time of the conversion.

After tender.

Interest ceases to run after a tender. Lord Ellenborough: "I think interest ought to stop from the offer to pay" (*n*).

How bankers should charge it on checks.

A banker, in charging interest to a customer who has overdrawn his account, should compute it, not from the date, but from the payment of the customer's checks (*o*).

Recovery of interest after receipt of the principal.

Though the principal have been paid, yet the plaintiff may proceed for interest, unless it have been incurred by the negligence of the plaintiff (*p*). So where for the amount of the principal on an overdue bill another bill was given, and afterwards paid, it was held that an action lay on the original bill for the interest (*q*).

When interest not recoverable.

We have already observed, that where interest is not payable by the terms of the instrument, it is in the nature of damages. Hence it has been held, that the owner of a bill is not necessarily and invariably entitled to interest, but that a jury are justified in reducing or withholding it altogether (*r*).

When an engagement to give a bill will create a liability to interest.

An engagement to give a bill will create a liability to interest on a contract, which would not otherwise carry it. Thus, where goods are sold to be paid for by a bill which is not given, interest is recoverable as part of the price of the goods, and it has been held, that this interest may be recovered in an action for goods sold and delivered (*s*).

Liability of a guarantor for interest.

A party who guarantees the due payment of a bill is liable for interest (*t*).

(*n*) *Dent* v. *Dunn*, 3 Camp. 296.

(*o*) *Goodbody* v. *Foster*, Camb. Sum. Ass. 1831, Lyndhurst, C. B.

(*p*) *Laing* v. *Stone*, M. & M. 229, n.; 2 M. & Ry. 561, S. C.

(*q*) *Lumley* v. *Musgrave*, 4 Bing. N. C. 9; 5 Scott, 230, S. C. but see the Chapter on PAYMENT. p. 227.

(*r*) *Cameron* v. *Smith*, 2 B. & Ald. 308; *Du Belloix* v. *Lord Waterpark*, 1 D. & R. 16; and see *Dent* v. *Dunn*, 3 Camp. 296.

(*s*) *Marshall* v. *Poole*, 13 East, 98; *Farr* v. *Ward*, 3 M. & W. 26; 6 Dowl. 163, S. C.

(*t*) *Ackerman* v. *Ehrensperger*, 16 M. & W. 99.

CHAPTER XXIII.

How interest is recovered.

Where the action goes on to trial, the jury assess the interest, the plaintiff's counsel usually stating the sum which is claimed. Where judgment goes by default in debt, the plaintiff indorses on the writ of execution more than the exact sum due at his peril. In actions of assumpsit the courts have *the power* of assessing the damages, but in order to inform the conscience of the courts they usually issue a writ of inquiry. In actions on bills and notes, however, the amount of damages being mere matter of calculation, the writ of inquiry is supplied by a reference to the Master to compute principal and interest (*u*).

The rate of interest.

The rate of interest usually allowed is five per cent., but we have seen that the jury may reduce the rate, or they may increase it. Thus, where a bill carries ten per cent. interest from its date, a jury may give the same rate of interest from its maturity to judgment (*x*).

Indebitatus count.

The common indebitatus count for interest is good (*y*).

USURY.

Until recently, to contract for more ~~or to take more~~ than five per cent. interest on any transaction relating to bills or notes was usurious ~~and illegal~~. Recent statutes, however (*z*), which will be considered in their order, first exempted a large proportion of bills and notes from the operation of the usury laws, and at length repealed the usury laws altogether. But as the latitude conceded by the Legislature had until recently its limits, and as questions may still arise on bills and notes ~~even~~ of earlier date (*a*), it will still be necessary to treat of the law of usury in its operation on bills and notes. Moreover, usury laws still exist in France, Germany, America, Holland, and in almost all foreign countries where bills of exchange circulate; and in some states where usury laws have been repealed, they have been re-enacted. So that such questions may still arise on bills made or negotiated abroad. Further, the decisions on the usury laws, in their operation on bills and notes, are in

(*u*) See the Common Law Procedure Act, 1852, s. 94, and 18 & 19 Vict. c. 67.

(*x*) *Keene* v. *Keene*, 27 L. J., C. P. 89; 3 C. B., N. S. 144, S. C.

(*y*) *Nordenstrom* v. *Pitt*, 13 M. & W. 723.

(*z*) 3 & 4 Will. 4, c. 98, s. 7; 1 Vict. c. 80; 2 & 3 Vict. c. 37, and 17 & 18 Vict. c. 90.

(*a*) In America, and in most European countries, laws against usury still exist. In France, after a temporary repeal, they have been re-enacted, and, under the late Republic, made more stringent. The subject is there again undergoing discussion with much difference of opinion among the most enlightened men.

many cases applicable where the illegality of the consideration is of a different nature.

At common law.

Usury is said to be an indictable misdemeanor at common law (*b*).

Statutes against usury.

The stat. 37 Hen. 8, sect. 89, repeals all former enactments on this subject, and restrains the legal rate of interest to ten per cent. per annum, imposing a penalty on such as *take* more. This statute was itself repealed in the next reign, by the 5 & 6 Edw. 6, c. 20, which prohibited the taking of any interest whatever. The stat. 13 Eliz. c. 8, repeals the 5 & 6 Edw. 6, c. 20, thereby reviving the first-mentioned statute, and avoids all contracts on which more than eight or ten per cent. is reserved, as usurious. The 21 Jac. 1 reduces the legal rate of interest to eight per cent.; the 12 Car. 2, c. 13, further diminishes it to six per cent.; and lastly, the 12 Anne, st. 2, c. 16, reduces it to five per cent. The two last statutes of Anne and Charles are copied almost verbatim from the statute of James, and the statute of James contains substantially the same provisions as the two statutes of Elizabeth and Henry 8, taken together; so that all the cases on usury since 13 Eliz. are applicable to the law as it stood before the recent abolition of the usury laws.

Construction of them.

These statutes are to be construed most strongly for the suppression of usury, and the courts will look through the apparent form of a contract and the artifice of parties, at the substance and real nature of the transaction. "Where," says Lord Mansfield, "the real truth is a loan of money, the wit of man cannot find a shift to take it out of the statute" (*c*).

Effect of them.

The statute 12 Anne, st. 2, c. 16 (as well as the former enactments), contains two distinct provisions:

1. That no person, upon any contract, shall *take, accept or receive* for the loan of money or other commodities, above the rate of five per cent. per annum, under penalty of forfeiture of treble the money lent; one-half to the Crown, and the other moiety to him that will sue for the same.

2. That all bonds, contracts or assurances, whereby there shall be reserved or taken above the rate of five per cent. per annum, shall be utterly void.

(*b*) Com. Dig. Usury. (*c*) *Floyer* v. *Edwards*, Cowp. 114.

CHAPTER XXIII.

Hence it appears, that to make at once the assurance void and to incur the penalty, the contract must be for usurious interest, and usurious interest must be taken; but that, on the one hand, the penalty may be incurred without avoiding the contract, and that, on the other, the contract may be avoided without incurring the penalty. Thus, if a bond be given for the payment of a just debt, and it be afterwards agreed that the money secured by the bond shall remain in the hands of the obligor at usurious interest, and such interest be *taken*, the penalty is incurred, but the bond is still good (*d*). But if a man *contract* for usurious, yet *take* no more than legal interest, the assurance is void, though the penalty be not incurred (*e*).

There must be a loan.

To make a contract void for usury, there must have been *a loan* (*f*).

Therefore, if an acceptor discount his own acceptances, at a premium beyond legal interest, that is not usury; for the acceptor does not advance his own money to another, but merely pays a debt to another before it is due. "It is," says Lord Ellenborough, "an improper practice, but not usury" (*g*).

Usury on discounts.

But the ordinary transaction of discounting a bill or note is a lending within the statute. The party discounting does, in fact, lend money on interest, to be repaid either by the person receiving or by some other party to the bill, at

(*d*) *Ferrall* v. *Shaen*, 1 W. Saund. 294.

(*e*) *Fisher* v. *Beasley*, 1 Doug. 235. See Serjeant Williams's note to *Ferrall* v. *Shaen*, 1 W. Saund. 295, where the cases are collected.

(*f*) *Harvey* v. *Archbold*, 3 B. & C. 626; 5 D. & Ry. 500, S. C.

(*g*) *Barclay* v. *Walmsley*, 4 East, 55.

In America it is held that the purchase of a bill at any price is not usurious; but the purchase must be complete, so as to enable the purchaser to bring suit on it. A bill not accepted is not of this character.

Where an indorsee takes a bill or note with the indorsement or guaranty of the indorser, and advances thereupon less than the real value of the bill or note, the transaction is in effect a loan between the indorser and indorsee, and usurious.

If a note, made for the purpose of raising money, is discounted at a higher premium than the legal rate of interest, and none of the parties whose names are on it can, as between themselves, maintain a suit on the note when it becomes due, provided it had not been discounted, then such discounting of the note is usurious, for it is then that it first exists as a contract.

It is otherwise, however, if the purchaser is ignorant of the character of the note.

The taking of interest in advance upon the discount of a note is not usury; nor taking interest for both the first and last day. See Byles on Bills, 5th American ed. p. 462.

a certain prefixed period. The general rule of law is, that if the interest be retained at the time of the loan, or be stipulated to be paid before it falls regularly due, the contract is usurious (*h*). But, in favour of trade, an exception is allowed in the case of discount of bills. The interest is then allowed to be retained at the time of the loan, or, in other words, interest may be and is always charged, not on the sum actually advanced, but on the sum for which the bill is made payable (*i*). Thus, if a bill for 100*l.* at twelve months' date is discounted at five per cent., the sum actually paid is 95*l.*, and the 5*l.* discount received is, in fact, interest at the rate of more than 5*l.* 5*s.* 3*d.* on the loan. It is evident that, the longer the date of the bill, the greater the amount of the interest retained, the less the actual advance, and the higher the rate of interest on the advance; so that if a bill at twenty years' date were discounted at five per cent., the interest would annihilate the principal. This exception is, therefore, restrained to discounts in the ordinary course of trade, where the excess of charge above the legal rate is fairly referable to the trouble and expense to which the merchant or banker discounting is exposed (*k*). And the discounting of a bill at a very long date, as, for example, two or three years, seems of itself a suspicious circumstance; and, if it be done as an artifice to obtain more than legal interest, the transaction will be usurious, and the bill and any substituted security will be void, in the hands of the discounter, against all parties (*l*).

Usurious security for good debt.

If a bill or note be given on an usurious contract, but for a pre-existing legal debt, the debt is not extinguished, though the security is void (*m*).

(*h*) *Barnes* v. *Worlich*, Noy, 41; Cro. Jac. 25; Yel. 30; Moore, 644, S. C.

(*i*) It is held in America that the day on which a note is discounted is to be excluded in the computation of interest; but a day's interest has accrued at any time of the next day. See 5th American ed. of Byles on Bills, p. 463.

(*k*) *Marsh* v. *Martindale*, 8 Bos. & Pul. 154.

(*l*) Ibid.

(*m*) *Phillips* v. *Cockayne*, 3 Camp. 119. A. being about to purchase an estate, B. agreed to lend him money upon it, and before the conveyance from the vendor to A. was completed, on receiving the then title deeds, advanced the money; afterwards it was agreed between A. and B. that A. should pay usurious interest on the money advanced; and after this agreement, the conveyance from the vendor to A. was by A. handed over to B., A. having become bankrupt; held, that his assignees could not in trover recover the latter deed, because by the first agreement, untainted with usury, B. acquired a right to it. *Wood* v. *Grimwood*, 10 B. & C. 679.

CHAPTER XXIII.

Where the charge is not for the loan, but for the labour.

If the excessive charge be in any case no more than a fair remuneration for trouble and expense, it will not be usury. Thus, where a man took promissory notes to a bank to be discounted, and, on being asked how he would have the money, said, partly in cash, partly in account, and partly in bills on London, some at three, some at seven, and some at thirty days' sight; and the banker accordingly discounted the notes at five per cent. in that way, deducting discount for the whole time that the notes had to run, but making no allowance for the time which must elapse before the bills on London became payable, though the cash could not be said to be advanced by him till the bills on London fell due, and though in consequence he received more than legal interest for his advances, the transaction was held not to be usurious, for, the mode of payment being suggested by the other party, it could not have been devised by him as a screen for a corrupt loan. And it was held that the interest which he gained on the bills on London might be considered as a compensation for the trouble and expense of paying the money there; that the discount and remittance were separate transactions (*n*). But, where the substituted bill was not given at the particular request of the parties applying for discount, and was itself discounted, Lord Kenyon held the original discount usurious (*o*). A merchant, banker, or other person, may, in addition to the discount, take a reasonable and customary sum for remitting the note or bill for payment, and other incidental expenses (*p*). So he may take a commission for accepting or drawing bills, whether the bills be payable in the same place or not (*q*). No precise rate for commission in such cases is fixed by law, but the usual rate, sanctioned by the decisions, is 5*s.* per cent. Upon a long and complicated account a banker has been allowed to charge one half per cent.; but, in another case, where a person in general business, but not a banker, charged 7*s.* 6*d.* per cent. for discounting bills, and gave no evidence of having been put to any extraordinary trouble or expense, Lord Ellenborough thought the charge usurious (*r*). Whether in any case the charge for commission be but a fair remuneration for trouble and expense, or a mere artifice for charging illegal interest, is a question of fact for the jury (*s*).

(*n*) *Hammett* v. *Yea*, 1 B. & P. 144.

(*o*) *Matthews* v. *Griffiths*, Peake, 200.

(*p*) *Winch* v. *Fenn*, cited in *Auriol* v. *Thomas*, 2 T. R. 52; *Ex parte Jones*, 17 Ves. 332; *Baynes* v. *Fry*, 15 Ves. 120; *Masterman* v. *Cowrie*, 3 Camp. 488.

(*q*) *Masterman* v. *Cowrie*, 3 Camp. 488.

(*r*) *Brook* v. *Middleton*, 1 Camp. 445.

(*s*) *Carstairs* v. *Stein*, 4 M. & S. 192; *Harris* v. *Boston*, 2

To constitute usury, there must, further, be a *corrupt intention*, not, perhaps to evade the statute, for a man may not know that there is such a law; but his ignorance of the law here, as in all other cases, is no excuse, for it is one which (as Selden observes) every one might make, and nobody could tell how to refute him; but there must be a *corrupt intention to take exorbitant interest* (*t*). Thus the old cases show, that if illegal interest be reserved by mistake, as by an error in the computation of time, it is not usury (*u*). Accordingly, where A. was indebted to the plaintiff in a bond executed in St. Kitts, conditioned for the payment of 6,000*l.*, and six per cent. interest, and it was agreed that the principal should be paid in two bills of exchange at long dates, which were drawn in favour of the plaintiff, for the principal and interest which would be due at the time they were payable, the plaintiff's agent computing the interest by mistake still at six per cent., and the bond was then cancelled, Mansfield, C. J., held that the action on the bills might clearly be maintained for the sum *bonâ fide* due; as the excess in the amount of the bill had arisen from a mere mistake, and no intention to take usury could at any rate be imputed to the plaintiff himself (*x*). A. was indebted to B. in 80*l.*, and gave him a promissory note for 87*l.* 3*s.*, payable by four quarterly instalments (being the amount of the principal and legal interest), with a clause that, in case default should be made in payment of any one instalment, the whole sum should become payable. The court held that this was not a stipulation for usury, but for a penalty, and that A. was entitled to recover the whole sum on default (*y*). Where a broker was employed to get a bill discounted, which he did upon an agreement to reserve to himself 10*s.* per cent. commission, as the party advancing the money was no party to this agreement, and had no intention that more than legal interest should be charged, it was held that the discount was not usurious (*z*).

There must be a corrupt intention.

The contract must be for repayment of the principal, at all events; for if the principal be put in hazard, it is not

If the principal is put in hazard, it is not usury.

Camp. 348; *Masterman* v. *Cowrie*, 3 Camp. 488.

(*t*) It is held in America that parting with depreciated paper at par, and charging for the same the legal rate of interest, does not constitute usury. See 5th American ed. of Byles on Bills, p. 465.

(*u*) *Buckley* v. *Guilbank*, Cro. Jac. 677; *Nevison* v. *Whitley*, Cro. Car. 501.

(*x*) *Glasfurd* v. *Laing*, 1 Camp. 149.

(*y*) *Wells* v. *Girling*, 4 Moore, 78; 1 B. & B. 447; Gow, 21, S. C.

(*z*) *Dagnall* v. *Wigley*, 11 East, 43.

CHAPTER XXIII.

usury. "If I lend 100*l.* to have 120*l.* at the year's end upon a casualty, if the casualty goes to the interest only, and not to the principal, it is usury; for the party is sure to have the principal again come what will come; but if the interest and principal are both in hazard, it is not then usury" (*a*). Hence the purchase of an annuity with a clause for redemption by the grantor, though on terms never so exorbitant, is not usury. And where the lender becomes a partner with the borrower by deed in the borrower's trade, and is to receive profits thereout, in addition to the interest, to a certain amount, at all events, this may be a contract of partnership, and not an usurious loan (*b*). But if the lender do not profess to be a partner, and is nevertheless to receive a portion of the profits in addition to the interest, it is an usurious loan, for, though the lender thereby so far puts his principal in hazard as to render it liable to partnership creditors, yet it is no further hazarded than in the case of every other loan, namely, by the risk of the borrower's insolvency (*c*).

Where goods are advanced.

Usury may be committed within the express words of the statute, not only by advancing money, but by advancing *goods*, to be repaid in money. If goods are forced upon the borrower in lieu of money, as, for example, upon the party applying for the discount of a bill, the transaction is suspicious, and it lies on the lender to show not only that the goods were fairly worth the sum at which they were estimated, but that they would have been easily available in the borrower's hands for raising that sum by resale (*d*). But, where the lender requests or prefers to take goods, it lies on him to show that they were estimated above their real value (*e*).

Irish, colonial and foreign interest.

In Ireland, in many of the British colonies, and in various foreign states, more than five per cent. interest is allowed by the law of the place. Whenever the contract is made abroad it is not usurious here, because the utmost interest which the law of the place allows is reserved. But it often happens

(*a*) *Roberts* v. *Trenayne*, Cro. Jac. 507; *Chesterfield* v. *Jansen*, 1 Wils. 286.

(*b*) *Gilpin* v. *Enderbey*, 5 B. & Al. 954; 1 D. & Ry. 570, S. C.

(*c*) *Morse* v. *Wilson*, 4 T. R. 353.

(*d*) *Davis* v. *Hardacre*, 2 Camp. 375.

(*e*) *Coombe* v. *Miles*, 2 Camp. 553.

It has been held in America that a contract to lend a portion of the money wanted by the borrower, on condition that he will receive stock at a price much above the market value, to make up the deficiency, is usurious. See 5th American ed. of Byles on Bills, p. 467.

that the transaction is partly in one country and partly in another, so that whether it is to be considered as a domestic or a foreign contract, becomes a question of great nicety. A. resides in England, B. at Gibraltar, where the legal rate of interest is six per cent., and where a bill on England at ninety days is reckoned as cash. It was agreed that A. should consign to B. goods for sale, and that, upon the receipt of the invoice, B. should remit to A. bills on London at ninety days' date, and charge interest at six per cent., from the date of the bills. Lord Tenterden:—"The case must be considered as if the bargain for the advances had been made at Gibraltar and not in London" (*f*).

The statutes 14 Geo. 3, c. 79, and 1 & 2 Geo. 4, c. 51, the latter repealed, and re-enacted by 3 Geo. 4, c. 47, reciting that doubts had arisen on the point, enact, that all mortgages or securities of or concerning any lands, tenements, hereditaments, slaves, cattle, or other things, in Ireland or the West India colonies, whereby interest is reserved above the rate of five per cent., but not exceeding the rate allowed by the law of that place, are valid, *though executed in Great Britain*, as well as all bonds and covenants, original or collateral, for further securing money so advanced. It will be observed, that these statutes do not include bill and notes, and, therefore, it is a doubtful point, whether a bill or note not exempted from the Usury Laws by the recent statutes, and given in England as a collateral security for an Irish, colonial, or foreign debt, with more than five per cent. interest, be legal (*g*). It seems clear, however, that if the original security be cancelled, and a bill or note be taken as a substituted security, but carrying the original interest, such a bill or note is usurious (*h*).

Substituted security.

If an usurious bill or note be in the hands of a holder, who was either a party to or cognizant of the usurious transaction, and he give it up for a substituted security, as a note, or even if he deliver up this note for a further security, as a bond, the original usurious taint infects both the subsequent securities, and either is void (*i*). But, if the party taking a substituted security had no notice of the usury, the security is good (*k*). Yet, before 58 Geo. 3, c. 93, if a party had taken an usurious bill without notice of the usury, and, after-

(*f*) *Harvey* v. *Archbold*, 3 B. & C. 626; 5 D. & R. 500, S. C.

(*g*) See *Lord Ranelagh* v. *Champante*, 2 Vern. 395; 1 Eq. Ca. Ab. 289.

(*h*) *Glasfurd* v. *Laing*, 1 Camp. 149; *Dewar* v. *Span*, 3 T. R. 426.

(*i*) *Marsh* v. *Martindale*, 3 B. & P. 154.

(*k*) *Cuthbert* v. *Haley*, 8 T. R. 390; 3 Esp. 22, S. C.

CHAPTER XXIII.

wards, upon learning the defect, took a substituted bill, such second bill was void (*l*). But, if the substituted security be for principal and legal interest only, expunging the bad part of the debt, it is good (*m*). And where a bill or note is given on a consideration, partly usurious and partly legal, the holder cannot recover even for the good part, though the whole amount of the bill should not be sufficient to cover that (*n*).

Separate instruments.

It makes no difference that the contract is comprised in two separate instruments (*o*).

Innocent indorsee.

Before the late statute, if the bill were tainted with usury in its inception, or if it was necessary for the holder to make title through any party guilty of usury (*p*), he could not recover, though he had no notice of the usury. But now, by the 58 Geo. 3, c. 93, no bill or note, though given for an usurious consideration, or upon an usurious contract, shall be void in the hands of an indorsee for value, unless he had notice at the time of taking the bill that it had been given for an usurious consideration (*q*).

The statutes exempting certain bills and notes from the Usury Laws.

The 3 & 4 Will. 4, c. 98, s. 7, exempts from the operation of the Usury Laws bills and notes not having more than *three months* to run. It seems that a bill or note good within this act is not invalidated by being part of a real security (*r*).

On this statute it has been decided that a warrant of attorney given to secure a bill, which, but for the act, would

(*l*) *Chapman* v. *Black*, 2 B. & Ald. 588; *Amory* v. *Merryweather*, 2 B. & C. 573; 4 D. & R. 86, S. C.

(*m*) *Preston* v. *Jackson*, 2 Stark. 237; *Barnes* v. *Hedley*, 1 Camp. 157—180, d.; 2 Taunt. 184, S. C.

(*n*) *Harrison* v. *Hannel*, 5 Taunt. 780; 1 Marsh. 349, S. C.

(*o*) *Roberts* v. *Trenayne*, Cro. Jac. 507; *White* v. *Wright*, 3 B. & C. 273; 5 D. & R. 10, S. C.

(*p*) *Lowes* v. *Mazzaredo*, 1 Stark. 385.

(*q*) This statute does not apply to a note in the hands of a party who has taken it in payment of an antecedent debt; see also 5 & 6 Will. 4, c. 41; *Vallance* v. *Siddel*, 6 Ad. & Ell. 932; 2 N. & P. 78, S. C. In an action brought before the passing of this act, but tried after, the defendant may avail himself of 9 Anne, c. 14, and is entitled to a nonsuit if he prove the bill to be given for a gaming consideration. *Hitchcock* v. *Way*, 6 Ad. & Ell. 943; 2 Nev. & P. 72, S. C.

(*r*) *Clack* v. *Sainsbury*, 11 C. B. 695; *Nixon* v. *Phillips*, 7 Exch. 188; *Semple* v. *Cornwall*, 10 Exch. 617; *Ex parte Warrington*, 3 De Gex, M. & G. 159; 22 L. J., Bank. 33, S. C.; *Langton* v. *Haynes*, 25 L. J., Exch. 319; 1 H. & N. 366, S. C.

have been usurious, is within the protection of the statute (*s*). The act applies to a note payable to A. or order *on demand*, and given for money lent on an agreement to pay 5*l.* over and above all lawful interest for the loan during such time as A. should forbear, and give day of payment for the same (*t*).

The 1 Vict. c. 80, a temporary act, exempted from the operation of the Usury Laws bills and notes not having more than twelve months to run.

The 2 & 3 Vict. c. 37, exempts from the operation of the Usury Laws bills and notes not having more than twelve months to run, and *all contracts* (*u*) for the loan of money above the sum of ten pounds, providing that the act shall not extend to loans on landed security (*x*). But a loan of money on security of a lease, a warrant of attorney, and a promissory note, are not protected (*y*).

The question is, on what security was the money lent? If on a mortgage, and the bill were taken afterwards, there is no valid loan; if on a bill, and the mortgage were taken afterwards, there is a good debt (*z*). Where a party borrowed a sum of 6,700*l.* on the security of a mortgage and a promissory note, which was discounted by the lender at five per cent., so that the interest to be paid was more than five per cent. on the sum actually advanced, the mortgage was held valid, the jury finding that the primary object of the parties was the discounting of the note (*a*). The discount

(*s*) *Connop* v. *Meaks*, 4 Nev. & Man. 302; 2 Ad. & E. 326, S. C.; *Lane* v. *Horlock*, 25 L. J. Chan. 253; 5 H. L. Cas. 580, S. C.

(*t*) *Vallance* v. *Siddel*, supra, note (*q*).

(*u*) *Thibault* v. *Gibson*, 12 M. & W. 88.

(*x*) So that, as the law recently stood, persons who have security to offer, and require no protection, were protected; but those who had no security to offer, and therefore most needed protection, were unprotected.

(*y*) *Berrington* v. *Collis*, 5 Bing. N. C. 332; 7 Scott, 302, S. C. As to renewals and agreements to give bills at a future time, see *Holt* v. *Miers*, 5 M. & W. 168; *King* v. *Braddon*, 10 Ad. & E. 675; 2 Per. & D. 546, S. C.

(*z*) *Downes* v. *Garbutt*, 12 L. J., Q. B. 269; 2 Dowl. N. S. 939; S. C.; *Fussell* v. *Daniel*, 10 Exch. 581; and see *Hodgkinson* v. *Wyatt*, 4 Q. B. 749; *Follett* v. *Moore*, 19 L. J., Exch. 6; 4 Exch. 410, S. C.; *Ex parte Warrington*, 3 De Gex, M. & G. 159; 22 L. J., Bank. 33, S. C. But see *Langton* v. *Haynes*, 25 L. J., Exch. 319; 1 H. & N. 366, S. C.

(*a*) This transaction was before the statute 2 & 3 Vict. c. 37. *Doe* v. *King*, 12 L. J., Exch. 320; 11 M. & W. 333, S. C. *Quære* whether an advance on the deposit of a policy of insurance, though the insurance company have real securities, and though the assured be a member of the company, is a loan secured by an interest in land. *March* v. *The Attorney-General*, 5 Beavan, 433.

CHAPTER XXIII.

of bills is not illegal, though the amount be secured by a warrant of attorney, which may become a charge on land (*b*).

The statute 2 & 3 Vict. c. 37 (*c*), is not disabling or retrospective, and therefore if a real security be given for the amount of bills discounted at more than five per cent. before the statute, under the 1 Vict. c. 80, the real security is not tainted with usury (*d*).

Total repeal of the Usury Laws.

But now the statute 17 & 18 Vict. c. 90, sweeps away the Usury Laws altogether. And it has been held, that bills accepted since the repeal, in renewal of usurious bills accepted before the repeal, are not without consideration (*e*).

Pleading.

In a declaration or plea, grounded on the statute of 12 Anne, stat. 2, c. 16, it is not necessary to negative the exception introduced by the 2 & 3 Vict. c. 37. The exception must come from the other side (*f*).

And in stating that exception it lies on the party introducing it to aver not only that the contract was after the passing of the statute of Victoria, but that it did not relate to land (*g*).

(*b*) *Lane* v. *Horlock*, 16 L. J., Q. B. 87; *Lane* v. *Horlock*, 25 L. J., Chan. 253; 5 H. L. Cas. 580, S. C.

(*c*) This act was extended by the 4 & 5 Vict. c. 54, to the 1st January, 1844; by 6 & 7 Vict. c. 45, to the 1st January, 1846; by the 8 & 9 Vict. c. 102, to the 1st January, 1851, and by 13 & 14 Vict. c. 56, to 1st January, 1856.

(*d*) *Bell* v. *Coleman*, 15 L. J. C. P. 2; 2 C. B. 268, S. C.

(*e*) *Flight* v. *Read*, 32 L. J. 265; 1 H. & C. 703, S. C.

(*f*) *Thibault* v. *Gibson*, 12 M. & W. 88.

(*g*) *Washbourne* v. *Burrows*, 16 L. J., Exch. 266; 1 Exch. 107, S. C.

CHAPTER XXIV.

OF THE ALTERATION OF A BILL OR NOTE.

Effect of Alteration at Common Law . . 317
Of Deeds 317
Of Bills and Notes . . 318
UNDER THE STAMP ACTS 319
Where an Alteration will not vitiate . . . 319
Before Bill issued . . 320
In Correction of a Mistake 321
When the Alteration of the Instrument extinguishes the Debt . . . 321
Renewal of altered Bill . 322
When Alteration need not be pleaded . . . 322
When it must be pleaded . 323
Requisites of Plea . . 323
BURTHEN OF PROOF . 323

CHAPTER XXIV.

Effect of alteration at common law.

IN treating of the alteration of a negotiable instrument, we will consider the effect of alteration; first, at common law; and, secondly, under the Stamp Acts.

Of deeds.

First, at common law. If a deed, well and sufficiently made in its creation, shall be afterwards altered by rasure, interlining, addition, drawing a line through the words, though they be still legible, or by writing new letters upon the old in any material place or part of it, either by the party that hath the deed, or any other whomsoever, unless the alteration be by him who is bound by the deed (for he shall not take advantage of his own wrong), or by his consent, the deed has lost its force and is become void (*a*).

And by a recent solemn decision, a deed, bill of exchange, promissory note, guarantie, or any other executory written contract, is avoided by an alteration in a material part, made while it is in the custody of the plaintiffs, although that alteration be by a stranger (*b*). For a person who has the custody of an instrument is bound to preserve it in its integrity. And as it would be avoided by his fraud in

(*a*) Sheppard's Touchstone, 68. And a deed is not it seems vacated at common law, if the alteration, though material, were with the consent of all the parties. *Markham* v. *Gonaston*, Cro. Eliz. 627; *Zouch* v. *Clay*, 2 Lev. 35; Com. Dig. Fait, F. 1.

(*b*) *Davidson* v. *Cooper*, 11 M. & W. 778; affirmed in error, 13 M. & W. 343; *Bank of Hindustan* v. *Smith*, 36 L. J., C. P. 241.

It is held in America that an alteration by a stranger, though material, will not render the instrument inoperative. See 5th American ed. of Byles on Bills, p. 472.

CHAPTER XXIV.

altering it himself, so it shall be avoided by his *laches* in suffering another to alter it.

Of bills and notes.

The rules relating to alteration or rasure of deeds apply (at least for the most part) to other written contracts, and to bills and notes. Thus, where a bill was drawn payable to A. B., and whilst in his possession the date was altered, and the bill was subsequently indorsed to the plaintiffs for value, it was held that they could not recover against the acceptor. "It seems admitted," says Ashhurst, J., "that if this had been a deed, the alteration would have vitiated it. Now, I cannot see any reason why the principle on which a deed would have been avoided, should not extend to a case of a bill of exchange. There is no magic in parchment or wax, and the principle to be extracted from the cases is, that any alteration avoids the contract. If A. B. had brought this action, he could not have recovered, because he must suffer from any alteration of the bill whilst in his custody; the same objection must hold against the plaintiffs, who derive title from him" (*c*). So, where the drawer, ***without the consent of the acceptor***, added to the acceptance the words "Payable at Mr. B.'s, Chiswell Street," it was held that this was a material alteration, discharging the acceptor (*d*). And the same point has been repeatedly decided since the 1 & 2 Geo. 4, c. 78. "Suppose," says Abbott, C. J., "a bill so altered to be indorsed to a person ignorant of the alteration; his right to sue his indorser would, as the bill appears, be complete, upon default made where the bill is payable; whereas, in truth, the acceptor, not having in reality undertaken to pay there, would have committed no default by such non-payment. I am of opinion, therefore, that the alteration is in a material part of the bill, and the acceptor is, in consequence, discharged" (*e*).

But it has been held by the same learned Judge (*f*), and

(*c*) *Master* v. *Miller*, 4 T. R. 320; in error, 2 H. Bl. 140, S. C.

(*d*) *Cowie* v. *Halsall*, 4 B. & Al. 197; 3 Stark. 36, S. C.

(*e*) *M'Intosh* v. *Haydon*, R. & M. 362; *Desbrowe* v. *Weatherby*, 1 M. & Rob. 438; 6 C. & P. 758, S. C.; *Taylor* v. *Moseley*, 1 M. & Rob. 439, n.; *Semple* v. *Cole*, 8 L. J., Exch. 155. These decisions have been recently under review and confirmed by the Court of Queen's Bench in *Burchfield* v. *Moore*, 23 L. J., Q. B. 261; 3 E. & B. 683, S. C.; *Gardner* v. *Walsh*, 5 E. & B. 83.

(*f*) *Stevens* v. *Lloyd*, M. & M. 292; and see *Jacobs* v. *Hart*, 6 M. & S. 142; *Walter* v. *Cubley*, 2 C. & M. 151; but in *Walter* v. *Cubley*, the attention of the Court was not drawn to *Gibb* v. *Mather*, 8 Bing. 221; 1 Moore & S. 387; 2 C. & J. 254, S. C. Would not the alteration have been material in an action against the drawer? *Stevens* v. *Lloyd*, M. & M. 292; and if so, was not the legal effect of the instrument altered?

by the Court of Exchequer, that a similar addition, ***with the consent of the acceptor***, would not invalidate the instrument, either at common law or under the Stamp Act. Where a bill was addressed to A. B. & Co., and the acceptance was by A. and B., and the address was afterwards altered to correspond with the acceptance, as the acceptors would be liable either way, the alteration was held to be immaterial (*g*). An alteration of a foreign bill by adding either on the face of the bill or to the indorsements the rate of exchange, according to which the bill is to be paid, is fatal (*h*).

The addition of the words "interest to be paid at six per cent. per annum," written at the *corner* of the note, and not in the body, is a material alteration avoiding the note (*i*).

UNDER THE STAMP ACTS.

But, secondly, even if the consent of all parties have been obtained to an alteration in a material part, such alteration, nevertheless, avoids the bill under the Stamp Laws; for it is become a new and different instrument, and therefore requires a new stamp; which stamp cannot, as we have seen, then be affixed (*j*). Any alteration in the date, sum (*k*), or time of payment, the insertion of words rendering negotiable an instrument which before was not so, altering the words "***value received***," into an expression of the particular consideration which passed, are respectively material alterations, avoiding the bill under the Stamp Acts (*l*). But the addition of another name to a joint and several note on a different part of the face of the note, with the assent of all parties, has been held *ut res magis valeat* to operate as an indorsement (*m*).

Where an alteration will not vitiate.

There are, however, two cases in which an alteration, though in a material part, will not vacate the instrument; first, where such an alteration is made before the bill is issued, or become an available instrument; and, secondly,

(*g*) *Farquhar* v. *Southey*, M. & M. 17; 2 C. & P. 497, S. C.; *Hamelin* v. *Bruck*, 15 L. J., Q. B. 343; 9 Q. B. 306, S. C.

(*h*) *Hirschfield* v. *Smith*, 35 L. J., C. P. 177, L. R., 1 C. P. 340, S. C., though the additions were in red ink.

(*i*) *Warrington* v. *Early*, 23 L. J., Q. B. 47.

(*j*) *Wilson* v. *Justice*, Bayley, 6th ed. 118; *Bowman* v. *Nichol*, 5 T. R. 537; 1 Esp. 81, S. C.

(*k*) *Hamelin* v. *Bruck*, 15 L. J., Q. B. 343; 9 Q. B. 306, S. C.

(*l*) *Bathe* v. *Taylor*, 15 East, 412; *Walton* v. *Hastings*, 4 Camp. 223; 1 Stark. 215, S. C.; *Outhwaite* v. *Luntley*, 4 Camp. 179; *Knill* v. *Williams*, 10 East, 431.

(*m*) *Ex parte Yates*, 27 L. J., Bank. 9; 2 De G. & J. 191, S. C. But see *Gardner* v. *Walsh*, 5 E. & B. 83.

CHAPTER XXIV.

where the bill is altered to correct a mistake and in furtherance of the original intention of the parties (*n*).

Before the bill is issued.

Thus, where the drawer of a bill, payable to his own order, sent it to the drawee for acceptance, and the drawee requested that a longer time might be allowed for payment, and an alteration to that effect was accordingly made with the consent of the drawer, and the bill was afterwards accepted; it was held that, the alteration being made before the bill was an available instrument against any party, a new stamp was unnecessary (*o*). Upon the same principle, where three persons joined, as drawer, acceptor, and indorser, in the fabrication of an accommodation bill, and the date was altered before it came into the hands of a holder for value; it was held that, as the accommodation parties could not sue upon it *inter se*, it was not, till it came into the hands of a holder for value, an available instrument, and therefore that an alteration before that time did not vitiate it. "The question," says Abbott, C. J., "is, whether this alteration made it a new bill? Now, undoubtedly, when an accommodation bill has the different parties written upon it, it is, in some sense of the word, a bill of exchange; but it is utterly unavailable as a security for money, until it is issued to some real holder for a valuable consideration. It first became a bill of exchange when it was issued to the indorsee for a valuable consideration." "Here," adds Best, J., "at the time when the alteration was made, the bill was a perfect bill in form, but it did not constitute a valid contract between the parties. A bond is a perfect instrument before delivery; but still an alteration made before delivery will not vitiate it" (*p*). But if either payee or indorsee have given value for it, so that the drawer is liable, an alteration, though before acceptance, vacates the bill. "In such a case," says Lord Ellenborough, "it does not remain *in fieri* till acceptance. As to the drawer, it was before then a perfect instrument (*q*). When the date was altered, a new bill was drawn, and that could not be done without a new stamp" (*r*). So, if a promissory note be signed by A., and

(*n*) *Catton* v. *Simpson*, 8 Ad. & E. 136; overruled by *Gardner* v. *Walsh*, 5 E. & B. 83; but see *Ex parte Yates*, supra, and *Dodge* v. *Pringle*, 29 L. J., Exch. 115.

(*o*) *Kennerly* v. *Nash*, 1 Stark. 452.

(*p*) *Downes* v. *Richardson*, 5 B. & Ald. 674; 1 D. & R. 332, S. C.; *Tarleton* v. *Shingler*, 7 C. B. 812. As to the alteration of a deed after execution by one party, see *Jones* v. *Jones*, 1 C. & M. 721; before complete delivery, *Spicer* v. *Burgess*, 1 C., M. & R. 129; 4 Tyr. 598, S. C.

(*q*) *Walton* v. *Hastings*, 4 Camp. 223; 1 Stark. 215, S. C.

(*r*) *Outhwaite* v. *Luntley*, 4 Camp. 179.

subsequently by B., as surety for A., whilst the note is in the hands of the payee, it will be void, unless the signature of B. is in pursuance of a previous agreement at the time of making the note (*s*). And an altered bill will be void in the hands of an innocent indorsee, as well as in the hands of parties cognizant of the alteration (*t*).

To correct a mistake.

If, again, the alteration were merely to correct a mistake, or to make a bill what it was originally intended to be, it will not avoid it under the Stamp Act. Thus, where the drawer intended to make the bill negotiable, and indorsed it over, but had omitted the words "*or order*," their subsequent insertion in pursuance of the original intention was held not to vacate the bill (*u*). So, where a bill having been dated, by mistake, 1822, instead of 1823, the agent of the drawer and acceptor, to whom it had been given to be delivered to the indorsee, without their knowledge or consent, corrected the mistake; it was held, that such alteration did not vacate the bill (*x*). So, again, a man who has agreed beforehand to be a surety, may, after the advance to another maker, sign the note (*y*). A *bonâ fide* holder of a bill of exchange, accepted payable to ———, or order, may insert his own name as payee, and indorse it, and the bill may be declared on as payable to the party who has inserted his name. "One," says Best, C. J., "who accepts a bill in this form, undertakes to be answerable for it in the shape of a bill. That being so, he undertakes to be answerable for it in the form which a *bonâ fide* holder has a right to give it, and the description in the declaration is made out against him. No new stamp is necessary; the first stamp gives authority for the insertion" (*z*). Whether the intent of the alteration were to vary the original contract, or merely to correct a mistake, is a question of fact for the jury (*a*).

When the alteration of the instrument extinguishes the debt.

An alteration by the drawer and payee of the bill, or the payee of a note, though it avoids the instrument, does not

(*s*) *Clerk* v. *Blackstock*, Holt, N. P. C. 474. See *Ex parte White*, 2 Deac. & Chit. 334.

(*t*) *Outhwaite* v. *Luntley*, 4 Camp. 179.

(*u*) *Kershaw* v. *Cox*, 3 Esp. 246; 10 East, 437: *Jacobs* v. *Hart*, 2 Stark. 45; 6 M. & Sel. 142, S. C.; *Byrom* v. *Thompson*, 11 Ad. & Ell. 31; 3 P. & D. 71, S. C.

(*x*) *Brutt* v. *Picard*, R. & M. 37.

(*y*) *Dodge* v. *Pringle*, 29 L. J. Exch. 115.

(*z*) *Attwood* v. *Griffin*, R. & M. 425; 2 C. & P. 368, S. C.

(*a*) Ibid.

CHAPTER XXIV.

extinguish the debt (*b*); but an alteration by an indorsee not only avoids the security as against all parties, but also extinguishes the debt due to the indorsee from the indorser (*c*). For it would be unjust that the indorsee should compel the indorser to pay his debt, when the indorsee has destroyed the instrument on which alone, in some cases, and on which preferably in all cases, the indorser should sue. To make the indorser liable on the consideration and give him a cross action against the indorsee for the alteration, would be to oblige him to rely on the indorsee instead of the antecedent parties, and to prove a fact of which he might have no evidence; it would besides introduce a needless circuity of action. A *bonâ fide* transferee for value of an altered bill is in no better position as to his remedy on the bill than his transferer (*d*).

Renewal of altered bill.

If a bill be altered so that a man otherwise liable on it is discharged, he is not liable on a bill given in renewal of the altered bill, unless he were actually apprised of the alteration at the time he gave the substituted bill (*e*).

When alteration need not be pleaded.

It is conceived, notwithstanding some recent cases, that the alteration of a bill or note need not, when the plaintiff declares on the instrument *in its altered state*, be specially pleaded. When altered, it is no longer the same instrument that the defendant signed, and, moreover, there is no stamp applicable to the altered instrument, so that it cannot be looked at by the jury to prove the new contract. Therefore the defendant may, under the plea that he did not make, accept or indorse the instrument set forth in the declaration, show the alteration, and thereby prove that he executed another instrument, and not that in question (*f*), or, if there

(*b*) *Sutton* v. *Toomer*, 7 B. & C. 416; 1 M. & R. 125, S. C.; *Atkinson* v. *Hawdon*, 2 Ad. & E. 628; 4 N. & M. 409; 1 H. & W. 77, S. C.; see *Sloman* v. *Cox*, 1 C., M. & R. 471; 5 Tyr. 174, S. C. Unless the bill or note were taken in satisfaction of the debt. *Mc Dowall* v. *Boyd*, 17 L. J., Q. B. 295.

(*c*) *Alderson* v. *Langdale*, 3 B. & Ad. 660.

(*d*) *Burchfield* v. *Moore*, 23 L. J., Q. B. 261; 3 E. & B. 683, S. C.

(*e*) Means of knowledge are not equivalent to actual knowledge. *Bell* v. *Gardiner*, 11 L. J., C. P. 195; 4 M. & G. 11, S. C.

(*f*) *Cock* v. *Coxwell*, 2 C., M. & R. 291; 4 Dowl. 187; 1 Gale, 177, S. C.; *Calvert* v. *Baker*, 4 M. & W. 417; 7 Dowl. 17, S. C.; *Langton* v. *Lazarus*, 5 M. & W. 629; *Knight* v. *Clements*, 8 Ad. & E. 215; *Field* v. *Woods*, 7 Ad. & E. 114; *Crotty* v. *Hodges*, 4 M. & G. 563, and *Clifford* v. *Parker*, 2 M. & G. 909.

be no fresh stamp, that there is no instrument which the jury can look at.

When it must be pleaded.

But where the declaration is on the instrument, in its original condition, the alteration must be specially pleaded (*g*).

Requisites of plea.

The plea, where it merely relies on the absence of a proper stamp on the altered instrument, must show that the bill or note could not be made good by being stamped before the trial (*h*).

BURTHEN OF PROOF.

Where an alteration appears on the face of a bill or note, it lies on the plaintiff to show that it was made under such circumstances as not to vitiate the instrument (*i*). And this rule is most reasonable; for, if it lay on the defendant, on an acceptor for example, sued by an indorsee, to show that the alteration was improperly made, it might be a great hardship; for he may have no means of proving that the bill went unaltered from his hands, or of showing the circumstances of a subsequent alteration. But the burthen of explaining an alteration imposes no hardship on the plaintiff, for if the bill was altered while in his hands, he may, and ought, to account for it; if before, then he took it with a mark of suspicion on its face, which ought to have induced

(*g*) *Hemming* v. *Trenery*, 9 Ad. & E. 926; 1 Per. & Dav. 661, S. C.; *Bridgman* v. *Sheehan*, cor. Parke, B., at Nisi Prius, T. T. 1842; *Mason* v. *Bradley*, 12 L. J., Exch. 425; 11 M. & W. 590, S. C. But this distinction does not appear to have been recognized in some of the cases. See *Parry* v. *Nicholson*, 13 M. & W. 778.

(*h*) *Bradley* v. *Bardsley*, 15 L. J., Exch. 115; 3 D. & L. 476; 14 M. & W. 873, S. C.

(*i*) *Johnson* v. *Duke of Marlborough*, 2 Stark. 313; *Henman* v. *Dickinson*, 5 Bing. 183; 2 M. & P. 281, S. C.; *Knight* v. *Clements*, 3 N. & P. 375; 8 Ad. & E. 215, S. C.; *Bishop* v. *Chambre*, 1 M. & M. 116; 3 C. & P. 55, S. C. In *Sibley* v. *Fisher*, 7 Ad. & E. 444; 2 N. & P. 420, S. C., the making of the bill, as described in the declaration, was admitted on the record. See *Earl of Falmouth* v. *Roberts*, 9 M. & W. 471; *Desbrowe* v. *Weatherley*, 6 C. & P. 758; *Semple* v. *Cole*, 8 L. J., Exch. 155; 3 Jurist, 268, S. C. And whether the alteration were before or after the completion of the bill, has been left as a question of fact to the jury. *Taylor* v. *Moseley*, 6 C. & P. 273; and see *Leykrieff* v. *Ashford*, 12 Moore, 281.

It is said that the presumption against the legality of an alteration is confined to the cases of a bill of exchange or promissory note and a will. See *Doe* v. *Catamore*, 16 Q. B. 745, and *Doe* v. *Palmer*, 16 Q. B. 747, and the note to *Master* v. *Miller*, in 2 Smith's Leading Cases.

CHAPTER XXIV.

him either to refuse it, or to require evidence of the circumstances under which the alteration was made (*k*).

(*k*) The American cases on this subject are not harmonious. The weight of authority, however, sustains the positions in the text. Byles on Bills, 5th American ed. p. 481.

The question of the burthen of proof in such cases arose in the Supreme Court of Pennsylvania, in *Simpson* v. *Stackhouse*, 9 Barr. 186, and it was held that the onus of showing that an alteration in a material part of a negotiable instrument was lawfully made, is on the holder; and that where the place of payment is in a different handwriting from the body of the instrument, there is a presumption of alteration. See the 5th American ed. of Byles on Bills, p. 482.

CHAPTER XXV.

OF THE FORGERY OF BILLS AND NOTES.

Definition of the Crime . 325
Existing Statutes . . 325
Forgery of Void Bills . 326
Of Invalid and Informal Bills 326
Forgery by Misapplication of a Genuine Signature . 326
Misapplication of his own Signature by the Party signing 327
By Signature of a Fictitious Name . . . 327
By Fraudulent Signature of a Man's own Name . 328
Uttering a Genuine Signature, and Personating the Party signing . . 328
Misrepresentation of Authority 329
Alteration 329
Uttering 329
Procuring to utter . . 330
Statement of the Instrument in the Indictment . . 330
Where several make distinct Parts of the Instrument . 330
The Party whose Name is forged a Competent Witness 330
Forgery of Foreign Bills . 331
Evidence in Criminal Cases 331
CIVIL CONSEQUENCES OF FORGERY . . . 331
When the Payment of a Forged Bill is good . 332
When Money paid in Discharge of a Forged Bill may or may not be recovered back . . . 332
Inspection of a Bill supposed to be forged . . 335

CHAPTER XXV.

Definition of the crime.

FORGERY is the counterfeit (*a*) making or altering of any writing with intent to defraud. It is a misdemeanor at common law, punishable by fine and imprisonment (*b*), and a conviction of it, as of any other species of the *crimen falsi*, makes a man infamous, and formerly rendered him incompetent as a witness (*c*).

Existing statutes.

The forgery of bills or notes, or of any part of them, and the uttering of them knowing them to be forged, are respectively felonies, punishable by penal servitude for life (*d*).

Fraudulently obliterating or altering the crossing of a check is felony (*e*).

(*a*) See *Reg.* v. *White*, 1 Den. C. C. 208.

(*b*) 4 Bl. Com. 248.

(*c*) Com. Dig. Testm. A. 5; *Rex* v. *Davis*, 5 Mod. 74. He is now capacitated by 6 & 7 Vict. c. 85.

(*d*) 24 & 25 Vict. c. 98, s. 22.

(*e*) 24 & 25 Vict. c. 98, s. 25.

CHAPTER XXV.

The fraudulent signing of a bill or note for any other person by procuration or otherwise, without lawful authority, or knowingly uttering the same, has, by the recent act, 24 & 25 Vict. c. 98, s. 24, for the first time been erected into a felony (*f*).

Inducing a person by violence or threats to execute a bill or note or other valuable security, is now also for the first time made a felony (*g*).

Fraudulently to obtain by false pretences a signature to a bill or note, or the destruction of the instrument in whole or in part, is now a misdemeanor (*h*).

Forgery of void bills.

Forging or uttering such a bill or note as the Legislature has declared void, is not within the statutes, as, for example, a bill or note for less than 20*s*., or a bill or note for less than 5*l*., which did not comply with the requisites of 17 Geo. 3, c. 30 (*i*), in the former state of the law.

Of invalid and informal bills.

Where there is no payee, or no maker's name, it has been held that the offence is not within the act (*j*).

A mere informality, as the omission of the word POUNDS in the body, where the letter £ precedes the figures 50 in the margin (*k*), does not prevent the crime amounting to forgery.

In order to constitute forgery, it is not necessary that the instrument should be duly stamped, or stamped at all (*l*).

Forgery by misapplication of a genuine signature.

The most common species of forgery is, fraudulently

(*f*) See as to the law before this statute, *Maddock's case*, 2 Russ. C. & M. 499; *Reg.* v. *White*, 1 Den. C. C. 208; 2 C. & K. 404.

(*g*) 24 & 25 Vict. c. 96, s. 48. See *Rex* v. *Phipoe*, 2 Leach, 673; *Rex* v. *Edwards*, 6 C. & P. 521.

(*h*) 24 & 25 Vict. c. 96, s. 90. See *Reg.* v. *Danger*, 1 D. & B. C. C. 307.

(*i*) *Rex* v. *Moffat*, 1 Leach, 431; 2 East, P. C. 954, S. C.

(*j*) *Rex* v. *Richards*, R. & R., C. C. 193; *Rex* v. *Randall*, R. & R., C. C. 195; and see as to other fatal defects, *Rex* v. *Jones*, Doug. 287; *Rex* v. *Pateman*, R. & R. 455, where there was no maker's name; *Rex* v. *Burke*, R. & R. 496; *Rex* v. *Wilcox*, Bayley, 6th ed. 11. To constitute the forgery of a bill of exchange within 1 Will. 4, c. 66, s. 4, the instrument must be complete. *Reg.* v. *Turpin*, 2 C. & K. 820. Forging an acceptance to an instrument in the form of a bill, but without the drawer's name, is not within the statute. *Reg.* v. *Butterwick*, 2 Moo. & R. 196.

(*k*) *Rex* v. *Post*, R. & R. 101, and Bayley, 11; and see *Collinson's case*, 2 Leach, 1048.

(*l*) *Teague's case*, 2 East, P. C. 979; R. & R. 33, S. C.; *Rex* v. *Hawkeswood*, 1 Leach, 257; 2 East, P. C. 955, S. C.; *Rex* v. *Lee*, 1 Leach, 258, n.; *Merton's case*, 2 East, P. C. 955.

writing the name (*m*) of an existing person. But a fraudulent misapplication of the genuine signature of another man is as much forgery as counterfeiting his signature. Thus, where the prisoner, having in his possession the genuine signature of one Thomas Gibson, wrote over it a promissory note for 6,400*l*., he was indicted and convicted of having forged the note (*n*). And where the same prisoner, having the genuine signature of Samuel Edwards, wrote on the other side of the paper a promissory note, payable to Samuel Edwards, and so turned the genuine signature into an indorsement, he was convicted of forging the indorsement (*o*). So if a clerk be intrusted to fill up a blank check signed by his master with a particular sum, and he fraudulently inserts a larger sum, it is a forgery of the check (*p*).

Misapplication of his own signature by the party signing.

There may be an innocent misapplication of his own genuine signature by the party himself: Thus, where a man was induced to sign his name to a bill by a fraudulent misrepresentation of the nature of the instrument, it was held that, if not guilty of negligence, he was not liable even to an innocent holder, any more than if he had been blind or illiterate, and the instrument had been falsely and fraudulently read over to him (*q*).

By signature of fictitious name.

To sign the name of a fictitious or non-existing person is forgery (*r*). Where the prisoner was convicted of forging an order for payment of money, and it appeared that he had bought goods from the prosecutor, and paid for them with a draft signed in the fictitious name of H. Turner, although the prosecutor had sworn that he gave credit to the prisoner and not to the draft, it was held that the prisoner was rightly convicted. The Judges said that it was a false instrument, not drawn by any such person as it purported

(*m*) Making a mark, and suffering the assumed name to be written against it, is forgery. *Rex* v. *Dunn*, 1 Leach, 57; 2 East, P. C. 962. Putting the address of an *existing* person to a name, being the name of another person, is forgery. *Reg.* v. *Blenkinsop*, 1 Den. C. C. 276.

(*n*) *Rex* v. *Hales*, 17 St. Tr. 161.

(*o*) *Rex* v. *Hales*, 17 St. Tr. 209, 229.

(*p*) *Reg.* v. *Wilson*, 17 L. J., M. C. 82; 1 Den. C. C. 284, S. C.; *Rex* v. *Hart*, 1 Moo. C. C. 486; 7 C. & P. 652, S. C.

(*q*) *Foster* v. *Mackinnon*, L. R., 4 C. P. 704; and the English and American authorities there cited.

(*r*) *Rex* v. *Francis*, Bayley, 6th ed. 572; Russ. & Ry. 209; *Lockett's case*, 1 Leach, 94; East, P. C. 940; *Taft's case*, 1 Leach, 172; East, P. C. 959; or in the prisoner's own name to represent a fictitious firm; *Reg.* v. *Rogers*, 8 C. & P. 629.

CHAPTER XXV.

to be, and that the using a fictitious name was only for the purpose of deceiving (*s*). But the signing a fictitious name will not amount to forgery, if it were used on other occasions as well as for that very fraud, or system of fraud, of which the forgery forms a part (*t*). Where proof is given of the prisoner's real name, and no proof of any change of name until the time of the fraud committed, it lies on the prisoner to show that he has before assumed the false name on other occasions, and for other purposes unconnected with forgery (*u*).

By signing a man's own name.

It is a forgery, also, to sign a man's own name with intention that the signature should pass for the signature of another person of the same name (*v*). And where a person, whose name was Thomas Brown, was indicted for forging a promissory note signed Thomas Brown, and it appeared that he had uttered the note as a note of Captain Brown, a fictitious person, and the prisoner was convicted, the Judges held the conviction right (*x*). But the adoption of a false description and addition, where a false name is not assumed, is not forgery. Thus, where the prisoner drew a bill, and directed it to "Mr. Thomas Bowden, baize manufacturer, Romford, Essex;" and it was accepted by one Thomas Bowden, but there was no Thomas Bowden of Romford, it was held by a majority of the judges, that the giving a false description of Bowden on the bill, with intent to defraud, was not forgery (*y*).

Uttering a genuine signature, and personating the party signing.

Where the signature on the bill is genuine, an uttering by another person, with a representation that he is the person whose signature is on the bill, is not forgery, or a felonious uttering. The prisoner uttered a bill purporting to be payable to Bernard M'Carthy, or order, and having the indorsement B. M'Carthy thereon: he was indicted for forging that indorsement, and uttering it knowing it to be forged; the jury found that there was such a man as B. M'Carthy, and that the indorsement was his handwriting, but that the prisoner passed himself off as that B. M'Carthy when he uttered the bill. The Judges were unanimous,

(*s*) *Sheppard's case*, 1 Leach, 226; 2 East, P. C. 967; *Whiley's case*, R. & R. 90.

(*t*) *Rex* v. *Bontien*, R. & R. 260.

(*u*) *Peacock's case*, R. & R. 278.

(*v*) *Mead* v. *Young*, 4 T. R. 28.

(*x*) *Rex* v. *Parkes*, 2 Leach, 773; 2 East, P. C. 963, S. C.

(*y*) *Webb's case*, R. & R. 405; 3 B. & B. 229, S. C.; *Rex* v. *Watts*, R. & R. 436; 6 Moore, 442; 3 B. & B. 197, S. C.

that as the indorsement was not forged the prisoner was not liable to be convicted (*z*).

Misrepresentation of authority.

Writing a principal's name "per procuration," but without authority, was not until the recent statute (*a*) forgery (*b*); nor, as it should seem, writing merely another man's name under a false pretence of authority (*c*), without any intention of imitating his handwriting.

Alteration.

Every fraudulent alteration, whether by subtraction, addition or substitution, is forgery, and would be so within the statutes, even did they not contain the word *alter*, as was decided on 2 Geo. 2, c. 15, which did not contain that word (*d*). The statute 11 Geo. 4 & 1 Will. 4, c. 66, contains the word "alter" as well as "forge." Nevertheless, an alteration may be described in the indictment as forgery (*e*). So, *e converso*, the discharging one indorsement and the insertion of another may be described as the *alteration* of an indorsement (*f*).

Procuring a man to forge is an offence within the statute (*g*).

Uttering.

It has been decided, that, in order to constitute an uttering, the instrument must be parted with, or tendered, or offered, or used in some way to get money or credit upon it (*h*). Therefore, where the defendant, in order to persuade an innkeeper that he was a man of substance, pulled out of his pocket-book a 500*l.* and 50*l.* note, and saying that he did not like to carry so much property about him, delivered them to the innkeeper to take charge of them for him, it was held that this did not amount to an uttering (*i*).

(*z*) *Rex* v. *Hevey*, 1 Leach, 229; 2 East, P. C. 556, S. C.; Bayley, 577.

(*a*) Vide ante, p. 326.

(*b*) *Reg.* v. *White*, 1 Den. C. C. 208; 2 C. & K. 404, S. C.

(*c*) Ibid.; but see *Awde* v. *Dixon*, 6 Exch. 869.

(*d*) *Rex* v. *Elsworth*, Bayley, 6th ed. 574; 2 East, P. C. 986; *Reg.* v. *Blenkinsop*, 1 Den. C. C. 276.

(*e*) *Rex* v. *Teague*, R. & R. 33; 2 East, P. C. 979; S. C.; *Rex* v. *Post*, R. & R. 101; *Rex* v. *Treble*, 2 Taunt. 328; 2 Leach, 1040; R. & R. 164, S. C.

(*f*) *Rex* v. *Birkett*, R. & R. 251.

(*g*) *Rex* v. *Morris*, Bayley, 6th ed. 580; R. & R. 270, S. C.

(*h*) *Rex* v. *Shukard*, R. & R. 200; and see *Reg.* v. *Radford*, 1 Den. C. C. 59; *Reg.* v. *Ion*, 2 Den. C. C. 475.

(*i*) Ibid.; and see *Holden's case*, R. & R. 154; 2 Leach, 1019; S. C.; *Palmer's case*, R. & R. 72; 2 Leach, 978, S. C.; *Rex* v. *Morris*, R. & R. 270; *Reg.* v. *Hill*, 2 M. C. C. 30.

CHAPTER XXV.

Procuring to utter has been held a common law felony only (*k*).

Procuring to utter.

But procuring to utter, if the person procured were innocent of the felony, is a statutable felony in the procurer (*l*).

Statement of the instrument in the indictment.

Before certain recent Acts of Parliament it was necessary to set out the forged instrument in the indictment in words and figures correctly: the slightest variance would have entitled the defendant to an acquittal. But the 14 & 15 Vict. c. 100, s. 5, in order to prevent justice from being defeated by clerical or verbal inaccuracies, enacted that, in all indictments for forging, or uttering any instrument, it shall not be necessary to set forth any copy or fac simile thereof, but it shall be sufficient to describe it by any name by which it would be usually known (*m*).

An indictment for the larceny, and therefore now for the forgery of a bill or note, may describe it, generally, as a bill of exchange or promissory note for the payment of the sum therein mentioned, without setting out the instrument (*n*). But if it be alleged in the indictment to have been signed or made by any person, the signature must be proved (*o*).

Where several make distinct parts of the instrument.

If several make distinct parts of the instrument, they are each chargeable with the forgery of the entire instrument (*p*). Those who knowingly prepare the paper or plates for the purpose are forgers (*q*).

The party whose name is forged a competent witness.

Before the 9 Geo. 4, c. 32, s. 2, a rule of evidence existed equally anomalous and inconvenient, that in a criminal prosecution for forgery, the party whose name was forged was incompetent as a witness, but now he is made competent by

(*k*) *Rex* v. *Morris*, Bayley, 6th ed. 580; R. & R. 270; 2 Leach, 1096, S. C. But see now 24 & 25 Vict. c. 94, ss. 1, 2, 49.

(*l*) Bayley, 6th ed. 581.

(*m*) And see now 24 & 25 Vict. c. 98, ss. 42, 43.

(*n*) *Milne's case*, Worcester Summer Assizes, 1800, decided by all the Judges; East's P. C. 602, S. C. Before this act it was held that, in an indictment for forgery, a bank post bill could not be described as a bill of exchange, but might be described as a bank bill of exchange. *Rex* v. *Birkett*, R. & R. 251.

(*o*) *Rex* v. *Craven*, R. & R. 14; 2 East, P. C. 601, S. C. The new statute 14 & 15 Vict. c. 100, gives most extensive powers of amendment; and as to the form of the indictment, see 24 & 25 Vict. c. 98, ss. 42, 43, 44. See also 16 & 17 Vict. c. 2.

(*p*) *Rex* v. *Bingley*, R. & R. 446; *Rex* v. *Kirkwood*, 1 Mood. C. C. 304; vide *Reg.* v. *Cook*, 8 C. & P. 582.

(*q*) *Rex* v. *Dade*, 1 Mood. C. C. 307.

that statute in all indictments or informations for forgery or uttering, either against principals or accessories, by common law or statute.

Forgery of foreign bills.

A doubt also formerly existed, whether the making or uttering of an instrument, payable abroad, was an offence within some of the repealed statutes (*r*). But the statute 11 Geo. 4 & 1 Will. 4, c. 66, s. 30, brought within the operation of the acts against forgery, instruments made, or purporting to be made, or payable, or purporting to be so, out of England (*s*). The statute now in force is 24 & 25 Vict. c. 98, s. 40.

Evidence in criminal cases.

Where the prisoner is indicted for using a fictitious name, some evidence must be given by the prosecutor that it is not his real name (*t*). But where the prisoner's real name is proved, it lies on him to show that he has before assumed the false name for other purposes (*u*).

Upon an indictment for uttering forged notes, evidence that the prisoner has uttered other forged notes is admissible as evidence of his knowledge of the forgery (*x*). But such notes must be produced, and proved to be forgeries (*y*). The admissibility of evidence, as to uttering forged bills of a different kind, has been doubted (*z*).

CIVIL CONSEQUENCES OF FORGERY.

Where the title to a bill or note is necessarily made through a forgery, even a *bonâ fide* holder for value has in general no right to sue upon it (*a*), or even retain it (*b*); and, therefore, as a general rule, if the acceptor or maker pay one who derives his title through a forgery, that will not discharge him (*c*). So, if a bill or check be altered and made payable

(*r*) *Rex* v. *Dick*, 1 Leach. 68; *Rex* v. *M'Kay*, R. & R. 71.

(*s*) The 18th section of 11 Geo. 4 & 1 Will. 4, c. 66, applies to plates of promissory notes of persons carrying on the business of bankers in the province of Upper Canada. This Act is repealed now, 24 & 25 Vict. c. 98, s. 16.

(*t*) *Rex* v. *Peacock*, Bayley, 6th ed. 579; R. & R. 278; *Bontien's case*, R. & R. 263.

(*u*) *Rex* v. *Peacock*, R. & R. 278.

(*x*) *Wylie's case*, 1 New R. 92; *Hough's case*, R. & R. 120; *Reg.* v. *Green*, 3 C. & K. 209.

(*y*) *Rex* v. *Millard*, R. & R. 245.

(*z*) S. C., Russ. & Ry. 247. As to the prisoner's admission relating to other bills, see *Reg.* v. *Cook*, 8 C. & P. 586; *Reg.* v. *Oddy*, 2 Den. C. C. 264; *Reg.* v. *Green*, 3 C. & K. 209.

(*a*) *Burchfield* v. *Moore*, 23 L. J., Q. B. 261; 3 E. & B. 683, S. C.

(*b*) *Esdaile* v. *Lanauze*, 1 You. & Col. 394; *Johnson* v. *Windle*, 3 Bing. N. C. 225; 3 Scott, 608, S. C.

(*c*) But a *banker* who pays a *draft on himself*, payable to *order* on demand, need not prove the

see article in the chapter on acceptance p 200

CHAPTER XXV.

for a larger sum than that originally inserted, should the drawee, banker or acceptor pay it, he cannot charge the drawer for the difference (*d*).

When the payment is good.

But, in case any act of the drawer facilitated or gave occasion to the forgery, he must bear the loss himself. A customer of a banker, on leaving home, intrusted to his wife several blank forms of checks, signed by himself, and desired her to fill them up according to the exigency of his business. She filled up one with the words, *fifty pounds, two shillings*, beginning the word fifty with a small letter in the middle of a line. The figures, 52 : 2 were also placed at a considerable distance to the right of the printed £. She gave the check, thus filled up, to her husband's clerk, to get the money. He, before presenting it, inserted the words "*three hundred*" before the word *fifty* and the figure 3 between the printed £ and the figures 52 : 2. It was presented and the bankers paid it. Held, that the improper mode of filling up the check had invited the forgery, and, therefore, that the loss fell on the customer and not on the banker (*e*).

So, if the acceptor of a bill tear the bill in two *animo cancellandi*, and the pieces are picked up in his presence and afterwards joined together so as to convey no notice of the cancellation to a stranger, a *bonâ fide* indorsee for value may acquire a title (*f*).

When money paid in discharge of a forged bill may or may not be recovered back.

It is a general rule of law, that money paid under a mistake, *as to facts*, may be recovered back. On this principle,

genuineness of the first or any subsequent indorsement. 16 & 17 Vict. c. 59, s. 19.

(*d*) *Hall* v. *Fuller*, 5 B. & C. 750; 8 D. & Ry. 465, S. C.; *Smith* v. *Mercer*, 6 Taunt. 76; 1 Marsh. 453, S. C.

(*e*) *Young* v. *Grote*, 4 Bing. 253; 12 Moore, 284, S. C. See *Ingham* v. *Primrose*, 28 L. J., C. P. 294; 7 C. B., N. S. 82, S. C.; *Ex parte Swan*, 30 L. J., C. P. 113; 7 C. B., N. S. 400, S. C.; *Orr* v. *Union Bank of Scotland*, 1 Macq. H. of L. Cases, 513; *British Linen Company* v. *Caledonian Insurance Company*, 4 Macq. H. of L. Cases, 107; *Foster* v. *Green*, 6 Hurlst. & Norm. 163. And it has been held that a principal who, through his own agent, sends money to his creditor, which is misapplied by the agent, is not responsible any further to the creditor, if the creditor's conduct facilitated the agent's fraud. *Horsfall* v. *Fauntleroy*, 10 B. & C. 755.

(*f*) *Ingham* v. *Primrose*, supra. This doctrine of estoppel has never been extended to instruments under seal. Such an extension was attempted in *Ex parte Swan*, 30 L. J., C. P. 113; 7 C. B., N. S. 400, S. C. But the Court of Common Pleas being equally divided, the rule dropped. The Court of Exchequer Chamber held that there was no estoppel. *Ibid.*, 32 L. J., Exch. 273.

if a forged note be discounted, the transferee, on discovery of the forgery, may recover back the money paid, the imagined consideration totally failing (*g*). But any fault or negligence on the part of him who pays the money on the note will disable him from recovering. Thus, where two bills of exchange falling due at different times were drawn on a man, and he paid the first without acceptance, and accepted and paid the second, and the signature of the drawer was some time afterwards discovered to be a forgery, Lord Mansfield held, that an acceptor is bound to know the handwriting of the drawer, and that it is rather by his fault or negligence than by mistake, if he pays on a forged signature (*h*). So, where a forged acceptance of the drawee was made payable at the plaintiff's, the drawee's bankers, and they paid the amount to the defendant, as a *bonâ fide* holder, but seven days afterwards, upon discovering the acceptance to be a forgery, informed the defendant of it, and demanded the money; it was held that they could not recover, for that a banker ought to know his customer's handwriting. Part of the Court held the defendant discharged, on the ground that, by the plaintiff's delay in giving notice of the forgery, he had lost his remedy against the antecedent parties (*i*). Where the fault is not entirely on the side of the party paying, he may still recover. Certain bills of exchange, purporting to bear, amongst others, the indorsement of A., were refused payment; the notary took them to the plaintiff, the London correspondent of A., and asked him to take up the bills for A.'s honour. The plaintiff, accordingly, paid the money to the defendants, holders of the bills, and struck out all the indorsements subsequent to A.'s. The same morning it was discovered that the respective signatures of A., the drawer, and acceptor, were forged. Plaintiff immediately sent notice to the defendants, in time for them to advise their indorser. The court held, that the plaintiff was entitled to recover his money back, and said, "A bill is carried for payment to the person whose name appears as acceptor, entirely as a matter of course. But it is by no means a matter of course to call upon a person to pay a bill for the honour of an indorser; and such a call, therefore, imports, on the part of the person making it, that the name of a correspondent, for whose honour payment is asked, is

(*g*) *Jones* v. *Ryde*, 5 Taunt. 488; 1 Marsh. 157, S. C.; *Bruce* v. *Bruce*, 5 Taunt. 495; 1 Marsh. 165, S. C.; *Gurney* v. *Womersley*, 4 E. & B. 133.

(*h*) *Price* v. *Neal*, 3 Burr. 1354; 1 W. Bl. 390, S. C.

(*i*) *Smith* v. *Mercer*, 6 Taunt. 76; 1 Marsh. 453, S. C. See, as to delay, *Pooley* v. *Browne*, 11 C. B., N. S. 566.

CHAPTER XXV.

actually on the bill. The person thus called upon ought, certainly, to satisfy himself that the name of his correspondent is really on the bill; but still, his attention may reasonably be lessened by the assertion that the call itself makes to him *in fact*, though no assertion may be made in words. And the fault, if he pays on a forged signature, is not wholly and entirely his own, but begins, at least, with the person who thus calls upon him. And though, where all the negligence is on one side, it may, perhaps, be unfit to inquire into the quantum; yet, where there is any fault in the other party, and that other party cannot be said to be wholly innocent, he ought not, in our opinion, to profit by the mistake into which he may, by his own prior mistake, have led the other; at least, if the mistake be discovered before any alteration in the situation of any of the other parties; that is, whilst the remedies of all parties entitled to remedy are left entire, and no one is discharged by *laches*. We think the payment, in this case, was a payment by mistake, and without consideration, to a person not wholly free from blame. The striking out an indorsement by mistake cannot, in our opinion, discharge the indorser" (*k*).

Where bankers who had paid a forged bill gave notice of the forgery, and demanded the money by one o'clock in the afternoon of the following day, the Court took time to consider, and at length unanimously held, that the money could not be recovered back. "In this case," they say, "we give no opinion upon the point, whether the plaintiffs would have been entitled to recover if notice of the forgery had been given to the defendants on the very day on which the bill was paid, so as to enable the defendants on that day to have sent notice to other parties on the bill. But *we are all of opinion that the holder of a bill is entitled to know, on the day when it became due, whether it is an honoured or dishonoured bill* (*l*); and that if he receives the money, and is suffered to retain it during the whole of that day, the parties who paid it cannot recover it back. The holder, indeed, is not bound by law (if the bill be dishonoured by

(*k*) *Wilkinson* v. *Johnson*, 3 B. & C. 428; 5 D. & Ry. 403, S. C.

(*l*) But if a banker, on whom a check is drawn, be also the banker of the holder, who pays in the check without any intimation of the character in which he desires the banker to receive it, whether as drawee, or as his, the holder's, agent, it will be presumed that the banker took it as the agent of the holder, and therefore the banker may, in the course of the next day, inform the holder that there are no effects, and that the check will not be paid. *Boyd* v. *Emmerson*, 2 Ad. & Ell. 184; 4 N. & M. 99, S. C.; and see *Kilsby* v. *Williams*, 5 B. & Ald. 815; 1 D. & C. 476, S. C.; *Pollard* v. *Ogden*, 2 E. & B. 459.

the acceptor) to take any other steps against the other parties to the bill till the day after it is dishonoured. But he is entitled so to do if he think fit; and the parties who pay the bill ought not, by their negligence, to deprive the holder of any right to take steps against the parties to the bill on the day when it becomes due" (*m*).

Inspection of a forged bill.

In an action on a forged bill, a Judge, on an affidavit of the forgery, will order that the defendant and his witnesses may inspect it, the defendant giving to the plaintiff a list of the witnesses to whom he proposes to exhibit it (*n*).

(*m*) *Cocks* v. *Masterman*, 9 B. & C. 902; 4 M. & Ry. 676; Dans. & Ll. 329, S. C.; and see *Mather* v. *Lord Maidstone*, 18 C. B. 273; 25 L. J., C. P. 311, S. C.; *Bollard* v. *Ogden*, 2 E. & B. 459.

(*n*) *Post*, Chapter on ACTIONS, and see *Thomas* v. *Dunn*, 6 M. & G. 274. It may even be done without an affidavit. *Woolner* v. *Devereux*, 9 Dow. 672.

CHAPTER XXVI.

OF THE STATUTE OF LIMITATIONS IN ITS APPLICATION TO BILLS AND NOTES.

Policy of the Law . . 336
When introduced . . 337
The Present Statute . . 337
Division of the Subject . 337
GENERAL OPERATION OF THE STATUTE . . 338
Does not destroy the Debt . 338
Foreign Statute of Limitations 339
WHAT LEGAL PROCEEDINGS IT LIMITS . . 339
Merchants' Accounts . . 339
Effect of Statute on Title of a Subsequent Transferee 339
WHEN IT BEGINS TO RUN 340
On Bill payable after Date 340
Payable on a Contingency . 340
Payable by Instalments . 340
Against an Administrator . 340
On a Bill at or after Sight 340
Bill payable on Demand . 341
After Demand . . . 341
In case of Fraud . . 342
In the case of an Accommodation Bill . . . 342
When there has been both Non-acceptance and Non-payment . . . 342
UP TO WHAT PERIOD THE TIME OF LIMITATION IS COMPUTED . . . 342
Death of Parties after Action 343
HOW THE OPERATION OF THE STATUTE IS OBVIATED BY ISSUING A WRIT 343
THE SAVING CLAUSE . 344
Infants 344
Imprisonment . . . 344
Plaintiff's Absence beyond Seas 344
Defendant's Absence beyond Seas 345
Successive Disabilities . 345
WHAT ACKNOWLEDGMENTS WILL TAKE A DEBT OUT OF THE STATUTE . . . 346
Lord Tenterden's Act . 346
Division of the Subject . 346
Of what Sort the Acknowledgment must be . . 346
Evidence of Date . . 348
Construction . . . 348
Mutual running Account . 348
Devise 348
Acknowledgment by Executors 349
Notice in Newspapers . 349
Part Payment . . . 349
Appropriation of Payments 349
Payment by Bill . . 350
Payment by Goods . . 350
Stamp on Acknowledgment 350
Statement of Account . 350
Payment of Interest . . 350
When Acknowledgment must be made . . . 351
Payment of Money into Court 351
By whom Acknowledgment must be made . . 351
To whom 354
What Evidence is required of the Acknowledgment . 355
HOW THE STATUTE IS TO BE TAKEN ADVANTAGE OF 357
Form of the Plea . . 357
Replication of the Statute . 358
Replication to a Plea of the Statute 358
WHEN, INDEPENDENTLY OF THE STATUTE, LAPSE OF TIME IS A BAR . 359

CHAPTER XXVI.

Policy of the law.

WITHOUT a limitation of actions no man can be secure in the enjoyment of his property. Prescription is the original

source of all title. After the lapse of years, evidence is weakened or destroyed. And a claimant who has long slept on his demand has no right to complain, if, for the public advantage, it is at length taken from him. In practice it is found that no statutes are so useful as those of limitation, compelling, as they do, investigation, whilst the means of investigation subsist, and supplying the loss of those means, by a general act of settlement, applicable to each man's case.

When introduced.

Though an act of limitation, in respect of real property, was passed in this country in the year 1270, yet, partly from the comparatively inconsiderable amount of personal property, partly from the frequency of the sales in *market overt*, and partly from the circumstance, that debts above 40*s.* were commonly secured by bond or single bill, and debts below that amount were not tried in the superior Courts, no limitation to personal actions was introduced till the year 1623, when the present Statute of Limitations of personal actions (the 21 Jac. 1, c. 16) was passed.

The present statute.

The enactments of that statute, so far as they are applicable to our present purpose, are as follows:

By s. 3, all actions on the case (other than such accounts (*a*), as concern the trade of merchandise between merchant and merchant, their factors and servants), and all actions of debt, grounded on any lending or contract without specialty, must be brought within six years of the cause of such actions, and not after.

By s. 4, if judgment for the plaintiff be arrested or reversed, or the defendant be outlawed and afterwards reverse the outlawry, the plaintiff, or his executor, may commence a new action within a year.

Section 7 provides, that if any person entitled to the action shall, at the time of the cause of action accrued, be, first, an infant, secondly, feme covert, thirdly, *non compos mentis*, fourthly, imprisoned, or, fifthly, beyond the seas, then such person may bring the action within six years after their full age, discoverture, sound memory, enlargement, or return from beyond the seas.

Division of the subject.

In treating of the effect of this statute in its relation to bills and notes, we shall consider, 1, its general operation, and whether it destroys the debt or only bars the remedy; 2, what actions or legal proceedings on those instruments it

(*a*) The exception of merchants' accounts is repealed by 19 & 20 Vict. c. 97, s. 9.

CHAPTER XXVI.

limits; 3, from what period the statute begins to run; 4, to what period the time of limitation is computed; 5, how the statute may be avoided by issuing a writ and continuing it down; 6, the proviso as to persons labouring under disabilities; 7, what promises, acknowledgments, or payments, will take a bill or note out of the statute; 8, how the statute is to be taken advantage of; and, lastly, when, independently of the statute, lapse of time will be a bar to an action on a bill or note.

GENERAL OPERATION OF THE STATUTE.

First, as to the general operation of the statute.

The Statute of Limitations is a good plea in equity as well as at law. It is also an answer to proof under a petition for adjudication in bankruptcy (*b*). It was formerly a doubt whether the statute was a bar in the Admiralty Courts to a suit for seamen's wages (*c*). But that doubt was removed by 4 Anne, c. 16, s. 17, which enacts, that all suits and actions in the Court of Admiralty for seamen's wages shall be commenced and sued within six years next after the cause of such suits or actions shall accrue, and not after.

Does not destroy the debt.

The Statute of Limitations does not destroy a debt, but only bars the remedy (*d*). Therefore, it must in all cases be pleaded, and cannot be given in evidence, even under the plea of *nil debet*, or the replication of *nil debet* to a set-off (*e*). Therefore, also a promissory note more than six years old, though not a good petitioning creditor's debt *as against the bankrupt* (who may object that the remedy by a petition in bankruptcy, as well as by action, is taken away), is nevertheless a good petitioning creditor's debt as against strangers (*f*). "It is settled," says Lord Mansfield, "that the Statute of Limitations does not destroy the debt, it only takes away the remedy; the objection lies in the mouth of the bankrupt himself, but not in the mouth of a third person" (*g*). Therefore, again, a lien may be en-

(*b*) *Ex parte Dewdney*, 15 Ves. 479.

(*c*) *Ewer* v. *Jones*, 6 Mod. 25.

(*d*) As to an agreement not to rely on the statute, see *East India Company* v. *Paul*, 14 Jur. 253; 7 Moo. P. C. C. 85; *Lade* v. *Trill*, 6 Jur. 272; *Waters* v. *Thanes*, 2 Q. B. 757.

(*e*) *Chapple* v. *Durston*, 1 C. & J. 1, overruling the opinion of Lord Holt at Hertford Assizes, 1690; *Anon.*, 1 Salk. 278; *Draper* v. *Glassop*, 1 Ld. Raym. 153.

(*f*) *Swaine* v. *Wallinger*, 2 Stra. 746.

(*g*) *Quantock* v. *England*, 5 Burr. 2628; 2 W. Bl. 703, S. C. See the same doctrine laid down by Lord Ellenborough and Bayley, J., in *Williams* v. *Jones*, 13 East, 450; and by the Court of Exchequer, in *Chapple* v. *Durston*, 1 C. & J. 1; *Mavor* v. *Pyne*, 2 C. & P. 91.

forced (*h*), where an action for its amount would be barred by the statute.

Foreign Statute of Limitations.

A foreign Statute of Limitations is no defence to an action on a foreign contract in the English Courts, unless it have the effect of extinguishing the contract, and the parties are living in the foreign country at the time of the extinction. For a Statute of Limitations usually affects the remedy merely, and not the construction of the contract (*i*).

WHAT LEGAL PROCEEDINGS THE STATUTE LIMITS.

Secondly, as to the actions and legal proceedings which the statute limits.

It will be sufficient for the present purpose to remark that actions of debt and of assumpsit are limited to six years (*k*). That though the statute does not in terms apply to proceeding in equity, courts of equity adopt its provisions as a rule (*l*). "With regard to that statute," says Sir William Grant, "though it does not apply to any equitable demand, yet equity adopts it, or at least takes the same limitation, in cases that are analogous to those in which it applies in law" (*m*). But the statute does not bar a trust (*n*), nor a legacy (*o*). We have already seen that the statute is a bar in bankruptcy.

Merchants' accounts.

The exception as to merchants' accounts (which, as we have seen, is now repealed) applied only to an action of account, or perhaps, also, to an action on the case for not accounting, but not to an action of indebitatus debt, or assumpsit (*p*).

Effect of the statute on the title of a subsequent transferee.

It is conceived, that if the statute have run out against the holder of a bill or note, payable at a day certain, and he then transfers it, the transferee's right of action is barred. For he, as transferee of an overdue bill, can stand in no better situation than his transferer. He, like his transferer, has a debt due to him, but has lost the right of action, and has notice of the loss of it (*q*). And, perhaps as to the

(*h*) *Spears* v. *Hartley*, 3 Esp. 81.

(*i*) *Huber* v. *Steiner*, 2 Bing. N. C. 202; 2 Scott, 304, S. C.; *Harris* v. *Quine*, L. R., 4 Q. B. 653. See the Chapter on FOREIGN LAW.

(*k*) Sect. 3.

(*l*) *Johnson* v. *Smith*, 2 Burr. 961; *Prince* v. *Heylin*, 1 Atk. 493.

(*m*) *Starhouse* v. *Barnston*, 10 Ves. 466.

(*n*) *Heath* v. *Hanley*, 1 Cha. Ca. 20.

(*o*) *Anon.*, 2 Freem. 22.

(*p*) *Inglis* v. *Haigh*, 8 M. & W. 769; and see *Cottam* v. *Partridge*, 4 M. & G. 271; 3 Scott, N. R. 174, S. C.

(*q*) See *Scarpelini* v. *Atcheson*, 7 Q. B. 864.

CHAPTER XXVI.

Statute of Limitations, the holder for the time being is a trustee of the action, so that prior or subsequent indorsees are, as between themselves and earlier parties, prejudiced by his laches (*r*).

WHEN IT BEGINS TO RUN.

Thirdly, as to the time from which the statute runs. The Statute of Limitations begins to run on a bill or note, as well as on any other contract, from the time that the action (*s*) first accrued to the party.

On a bill payable after date.

Therefore, on a bill payable at a certain period after date, the statute runs, not from the time the bill was drawn, but from the time when it fell due (*t*). And this is so also as to the account stated, of which the bill may be evidence (*u*).

Payable on a contingency.

So, where the maker of a note gave it to a third person, to be delivered to the payee after certain events should happen, the statute was held to run, not from the date of the note, but from the time of its delivery to the payee (*x*).

Payable by instalments.

It is conceived, that if a note be payable by instalments, and contain a provision that, if default be made in payment of one instalment, the whole shall be due, the statute runs from the first default against the whole amount of the note (*y*).

Against an administrator.

And so in an action on a bill by an administrator, who had not taken out administration till after the bill became due, it was decided that the statute ran, not from the time the bill fell due, but from the time of granting letters of administration, for there can be no action till there is a party capable of suing (*z*).

On a bill at or after sight.

As upon a bill drawn payable at or after sight, there is no right of action till presentment; so without such pre-

(*r*) See *Webster* v. *Kirke*, 17 Q. B. 947.

(*s*) Though at that time an action and judgment would have been fruitless. *Emery* v. *Day*, 1 C., M. & R. 245; 4 Tyr. 695, S. C.

(*t*) *Wittersheim* v. *Lady Carlisle*, 1 H. Bl. 631.

(*u*) *Fryer* v. *Roe*, 12 C. B. 437.

(*x*) *Savage* v. *Aldren*, 2 Stark. 232.

(*y*) See *Hemp* v. *Garland*, 4 Q. B. 519.

(*z*) *Murray* v. *East India Company*, 5 B. & Al. 204. But this interval is now to be computed where the administrator claims a chattel real, 3 & 4 Will. 4, c. 27, s. 6. The statute runs against an executor from the time the bill falls due, for he can commence an action before probate.

sentment the statute does not begin to run (*a*). If a note be payable at a certain period after sight (*b*), the statute runs from the expiration of that period, after the exhibition of the note to the maker.

On demand.

But we have seen, that if a bill or note be payable on demand, the words "*on demand*" are held not to constitute a condition precedent, but merely to import that the debt is due and payable immediately (*c*); or, at any rate, an action is sufficient demand. Therefore on a bill or note payable on demand, unless the note be accompanied by some writing restraining or postponing the right of action, the statute runs from the date of the instrument, and not from the time of the demand (*d*). Where a note payable on demand was given to a bank, accompanied by an agreement that the note should be held as a security for advances, the Court of Exchequer decided, in a recent case, that the statute did not begin to run against the note till after advances made, and a claim made as for a debt. The learned judge, however (Mr. Baron Martin), who tried the case, appears to have thought otherwise, or, at least, to have doubted. Where a loan was made by a check the statute was held to run, not from the date of the check, but from the time the check was cashed (*e*).

After demand.

If a note is made payable at a certain period *after demand*, it is like a note payable after sight, the demand and the lapse of the specified time after the demand are conditions precedent, and the statute runs from the time when the note falls due (*f*). And if a bill be made payable twelve months *after notice*, the statute does not begin to run till after notice and the twelve months subsequent (*g*).

(*a*) *Holmes* v. *Kerrison*, 2 Taunt. 323.

(*b*) *Sturdy* v. *Henderson*, 4 B. & Al. 592; *Sutton* v. *Toomer*, 7 B. & C. 416; 1 M. & Ry. 125, S. C.; *Holmes* v. *Kerrison*, 2 Taunt. 323; and see *Dixon* v. *Nuttall*, 1 C., M. & R. 307; 6 C. & P. 320, S. C.

(*c*) *Capp* v. *Lancaster*, Cro. Eliz. 548; *Rumball* v. *Ball*, 10 Mod. 38; *Collins* v. *Benning*, 12 Mod. 444; *M'Intosh* v. *Haydon*, R. & M. 363.

(*d*) *Christie* v. *Fonsick*, Sel. N. P. 9th ed. 351. This case is said to have been overruled in K. B., *sed quære*. If, indeed, a bond is conditioned to be void on payment on demand, a demand must be proved, or the bond is not forfeited. *Carter* v. *Ring*, 3 Camp. 459. In *Megginson* v. *Harper*, 2 C. & M. 322; 4 Tyr. 94, S. C., it was assumed that the statute ran from the date of the note, which was payable on demand. *Quære tamen*, if the note be a re-issuable one, and re-issued, or if it be payable at a particular place.

(*e*) *Garden* v. *Bruce*, L. R., 3 Ex. 300; 37 L. J. 112, S. C.

(*f*) *Thorpe* v. *Booth*, R. & M. 388.

(*g*) *Clayton* v. *Gosling*, 5 B. & C. 360; 8 D. & Ry. 110, S. C.

CHAPTER XXVI.

In case of fraud.

It has been suggested that where the plaintiff has been the subject of fraud, he may by a special replication avoid a plea of the statute, and postpone its application (*h*). It is now, however, settled that such a replication is bad (*i*). But possibly the fraudulent concealing of a cause of action on the part of a defendant till the plaintiff's remedy is gone, may constitute a substantive ground of action.

In the case of an accommodation bill.

Upon the contract which the law implies to indemnify an accommodation acceptor, it has been held, that the statute begins to run from the time at which the plaintiff is damnified by actual payment (*j*).

Where there has been both non-acceptance and non-payment.

If a bill be dishonoured by non-acceptance, and afterwards by non-payment, the statute runs from the refusal to accept (*k*).

UP TO WHAT PERIOD THE TIME OF LIMITATION IS COMPUTED.

Fourthly, as to the period up to which the time of limitation is computed.

The words of the statute 21 Jac. 1, c. 16, s. 3, are, all actions of trespass, &c. shall be *commenced* and sued within six years, &c.

Therefore, when, according to the old practice, writs bore *teste* of a day before the day of issuing them, it was held, that the time within which the action should be brought must be computed not to the teste but to the issuing of the writ (*l*).

At present no difficulty on this subject can exist, as the *date and teste* of a writ are the same (*m*).

Where an action is commenced in an inferior court, and removed into a superior court, the time of limitation is to be computed only to the commencement of the action in the inferior court (*n*).

To bar a set-off the six years must have expired before action brought (*o*).

(*h*) *South Sea Company* v. *Wymondsell*, 3 P. Wms. 143; *Bree* v. *Holbech*, Doug. 630; *Clark* v. *Hougham*, 2 B. & C. 149; 3 D. & Ry. 322, S. C.; *Ex parte Bolton*, 1 Mont. & Ayr. 60; *Granger* v. *George*, 5 B. & C. 149; *Browne* v. *Howard*, 2 B. & B. 73.

(*i*) *Imperial Gas Company* v. *London Gas Company*, 10 Exch. 39.

(*j*) *Reynolds* v. *Doyle*, 1 M. & G. 753; *Collinge* v. *Heywood*, 9 Ad. & E. 633; but see *Webster* v. *Kirk*, 17 Q. B. 944.

(*k*) *Whitehead* v. *Walker*, 9 M. & W. 506.

(*l*) *Johnson* v. *Smith*, 2 Burr. 950.

(*m*) 2 Will. 4, c. 39, s. 12.

(*n*) *Bevin* v. *Chapman*, 1 Sid. 228; *Matthews* v. *Phillips*, 2 Salk. 424.

(*o*) *Walker* v. *Clements*, 15 Q. B. 1046.

When the statute once begins to run, it never stops, except in the cases mentioned in the fourth section, although circumstances should arise in which it is impossible to sue, as if, for example, the debtor die before action, and no executor be appointed (*o*).

Death of parties after action.

But where an action has been commenced in time, and then the plaintiff dies, and the period of limitation has expired, the courts, by a strained construction of the statute, have allowed the personal representative to commence another action within a year from the plaintiff's death.

And where the defendant dies, a year is also given, and a year from the grant of administration where there is no executor. In the case of the defendant's death, the allowance of a year rests not only on the analogy to the case of a plaintiff, but also upon the general rule that where an action abates by the act of God, the same plaintiff may have a new writ by journey's accounts (*p*).

HOW THE OPERATION OF THE STATUTE IS OBVIATED BY ISSUING A WRIT.

Fifthly, as to the mode in which the operation of the statute may be obviated by issuing a writ and continuing it down.

According to the old practice, the plaintiff might issue a writ, and without serving it on the defendant, keep it in his pocket, and get it returned at any time within the six years (*q*), then file it (for it must have been filed) (*r*), and enter continuances, at any time, down to the writ on which the appearance was, and by replying the writ with the continuances, obviate the effect of the statute (*s*).

But this practice was abolished by the Uniformity of Process Act (*t*). By that act, no first writ affects the operation of the statute, unless the defendant has been arrested or served with it, or proceedings to outlawry have been had upon it, ***or unless*** the writ and every continuing writ is returned ***non est inventus***, and entered of record within one calendar month from its expiration; and each succeeding writ must issue within a month of the expiration of the pre-

(*o*) *Rhodes* v. *Smethurst*, 4 M. & W. 42; affirmed in error, 6 M. & W. 351, *post*, 336.

(*p*) *Curlewis* v. *Lord Mornington*, in error, 27 L. J., Q. B. 439.

(*q*) *Taylor* v. *Hipkins*, 5 B. & Al. 489.

(*r*) *Harris* v. *Woolford*, 6 T. R. 617.

(*s*) The first instance of a latitat replied is in *Coles* v. *Sybsye*, Styles's R. 156, A.D. 1649; and see *Dacy* v. *Clinch*, 1 Sid. 53. As the form of the plea now is, that the action did not accrue within six years before the commencement of the suit, it is not proper to reply the writ, but to traverse the plea and give the writ in evidence by producing the roll. *Dickenson* v. *Teague*, 1 C., M. & R. 241.

(*t*) 2 Will. 4, c. 39, s. 10.

CHAPTER XXVI.

ceding, and contain a memorandum (*u*) specifying the date of the first writ. The return of bailable process is to be made by the sheriff: of non-bailable, by the plaintiff or his attorney.

Now, by the 15 & 16 Vict. c. 76, ss. 11, 12, the writ is to be renewed every six months, and the original writ marked with a seal bearing the date of renewal.

A bill in equity, filed by one creditor on behalf of himself and the other creditors, will prevent the Statute of Limitations from running against any of the creditors who come in under the decree (*w*).

THE SAVING CLAUSE.

Sixthly, as to the saving clause in favour of infants, married women, lunatics, persons imprisoned or beyond seas.

Infants.

An infant would have been bound had he not been expressly excepted (*x*). For infants may, during the six years, sue by their guardians (*y*). An infant *cestui que trust* is bound by the *laches* of his trustee, even in equity (*z*).

Imprisonment.

The plaintiff's imprisonment now no longer postpones the running of the statute (*a*).

Plaintiff's absence beyond seas.

In the old Statutes of Limitations, passed before the union with Scotland, the saving clause in favour of absent claimants protected claimants "out of the realm;" but the statute 24 Jac. 1, c. 16, being after the union of the crowns, changed the expression "out of the realm," to the expression "beyond the seas." Scotland, therefore, is not within the saving (*b*), but Dublin, or any other place in Ireland, India (*c*), or the colonies, was. By the 3 & 4 Will. 4, c. 42, s. 7, no part of the British Isles is to be deemed beyond the seas (*d*). And now, from the meaning of the expression "beyond seas," whether applied to plaintiff or defendant, are excluded by the 19 & 20 Vict. c. 97, s. 12, all Great Britain and Ireland, the Islands of Man, Jersey, Guernsey,

(*u*) Of which the roll is no evidence. *Walker* v. *Collick*, 4 Exch. 171.

(*w*) *Sterndale* v. *Hankinson*, 1 Sim. 393.

(*x*) *Prideaux* v. *Webber*, 1 Lev. 31.

(*y*) *Chandler* v. *Vilett*, 2 Saund. 121, a.

(*z*) *Wych* v. *East India Company*, 3 P. Wms. 309.

(*a*) 19 & 20 Vict. c. 97, s. 10.

(*b*) *King* v. *Walker*, 1 W. Bl. 287.

(*c*) *Parnther* v. *Gaitskell*, 13 East, 432.

(*d*) See *Nightingale* v. *Adams*, 1 Show. 91.

Alderney and Sark and the islands adjacent. Foreigners were within the benefit of this saving. "If the plaintiff," say the Court of C. P. "is a foreigner, and doth not come to England in fifty years, he still hath six years after his coming into England to bring his action. And if he never comes into England himself, he has always a right of action while he lives abroad, and so have his executors or administrators after his death" (*e*). If one only of several *plaintiffs* were abroad, the case was not within the exception (*f*).

But now the plaintiff's absence beyond the seas is no disability, and gives no further time (*g*).

This statute is not retrospective (*h*).

Defendant's absence beyond seas.

The *defendant's* absence beyond seas is not a case within the 24 Jac. 1, c. 16 (*i*), though it is one in which the saving is much more necessary than when the plaintiff himself is absent, as an absent plaintiff may sue a defendant in England, but a defendant beyond seas could not formerly have been sued in England at all. To remedy this hardship, the statute 4 & 5 Anne, c. 16, s. 19, enacts, that if at the accruing of the action the defendant be beyond the seas, the plaintiff may bring his action within six years after the defendant's return. A mere setting foot on English ground is not a return within the statutes (*k*). If one of several *co-defendants* in an action, *ex contractu*, were abroad, the Statute of Limitations did not begin to run against any of them (*l*). But the statute 19 & 20 Vict. c. 97, s. 11, preserves the protection of the statute to such of the defendants as were within seas at the time of action accrued.

Successive disabilities.

When a disability is removed, and the statute once begins to run, no supervening disability will stop it (*m*).

(*e*) *Strithorst* v. *Græme*, 3 Wils. 145; 2 W. Bl. 723, S. C.; *Le Veux* v. *Berkeley*, 5 Q. B. 836; *Townsend* v. *Deacon*, 18 L. J., Exch. 298; 3 Exch. 706, S. C.; *Lafond* v. *Ruddock*, 13 C. B. 813. *Query*, whether the executors are limited to six years after the testator's death: *Townsend* v. *Deacon*, supra.

(*f*) *Perry* v. *Jackson*, 4 T. R. 516; *secus*, of one of several defendants. *Fannin* v. *Anderson*, 7 Q. B. 811.

(*g*) 19 & 20 Vict. c. 97, s. 10.

(*h*) *Flood* v. *Patterson*, 30 L. J., Chan. 486: but see *Cornill* v. *Hudson*, 8 E. & B. 429.

(*i*) *Hull* v. *Wyborn*, 1 Show. 98; *Swayn* v. *Stephens*, Cro. Car. 333.

(*k*) *Gregory* v. *Hurrill*, 1 Bing. 24; 8 Moore, 189, S. C.

(*l*) *Fannin* v. *Anderson*, 7 Q. B. 811; *Towns* v. *Mead*, 16 C. B. 123; *Forbes* v. *Smith*, 24 L. J., Exch. 299; 10 Exch. 717, S. C.; and see *Forbes* v. *Smith*, 11 Exch. 161. As to what is evidence for the jury of a person not having been in England, see *Koch* v. *Shepherd*, 18 C. B. 191.

(*m*) *Doe* d. *Duroure* v. *Jones*, 4 T. R. 310; *Smith* v. *Hill*, 1

CHAPTER XXVI.

Seventhly, as to the promises, acknowledgments, or payments, which take a bill or note out of the statute.

WHAT ACKNOWLEDGMENTS WILL TAKE A DEBT OUT OF THE STATUTE.

It was at first held, that nothing short of an express promise would take a debt out of the statute (*n*); then that a mere acknowledgment would, as evidence of a promise; and that a part payment of principal or interest amounted to an acknowledgment (*o*). The effect of these decisions was nearly to repeal the statute. Their consequences were somewhat restrained by the case of *Tanner* v. *Smart* (*p*), in which it was decided that a new promise or acknowledgment did not operate by drawing down the original promise to a subsequent date, but by giving a new cause of action; and that the promise stated in the replication is to be considered as the promise laid in the declaration, and must be consistent with it.

Lord Tenterden's Act.

At length, further to restrain the mischief, the late learned Lord Chief Justice of the King's Bench introduced the act 9 Geo. 4, by which it is enacted (*q*), that no acknowledgment or promise *by words only* shall take a case out of the statute, unless in writing, and signed by the party chargeable.

That where there are several joint contractors or executors one shall not lose the benefit of the statute through a written acknowledgment signed by the other, but the plaintiff shall recover against the acknowledging party only.

That the effect of *payment* of principal or interest, by any person, shall remain as before the statute (*r*).

Division of the subject.

In considering the operation of this and other parts of the act 9 Geo. 4, c. 14, on the 21 Jac. 1, c. 16, in respect of acknowledgments, promises or payments, as to bills or notes otherwise barred by the Statute of James, we shall inquire, first, what sort of an acknowledgment, promise or payment, it must be to take a debt out of the statute; secondly, at what time it must be made; thirdly, by whom; fourthly, to whom; and, lastly, by what evidence it must be proved.

Of what sort.

First, as to the sort of acknowledgment, promise or payment which will save the statute.

Wils. 134; *Gray* v. *Mendez*, 1 Stra. 556; *Rhodes* v. *Smethurst*, 4 M. & W. 42; 6 M. & W. 351, in error.

(*n*) *Dickson* v. *Thomson*, 2 Show. 126.

(*o*) *Hollis* v. *Palmer*, 2 Bing. N. C. 713; 3 Scott, 265, S. C.

(*p*) 6 B. & C. 603.

(*q*) Cap. 14, s. 1.

(*r*) See 19 & 20 Vict. c. 97, s. 14.

An acknowledgment, before the 9 Geo. 4, c. 14, must have been such an acknowledgment as implies a promise to pay, and must be so still. "That statute," says Tindal, C. J., "did not intend, as it appeared to us, to make any alteration, in the legal construction to be put upon acknowledgments or promises made by defendants, but merely to require a different mode of proof, substituting the certain evidence of a writing signed by the party chargeable instead of the insecure and precarious testimony to be derived from the memory of witnesses" (*s*). Therefore, the acknowledgment must not be accompanied with expressions repelling the inference of a promise to pay (*t*); and if a payment be made, accompanied by expressions which render the intention of the payment doubtful, then the meaning of any such expressions is a question of fact for a jury (*u*). If the promise be conditional, the condition must be shown to have been performed (*x*). "There must," says Rolfe, B., "be a *promise* to pay; but from a simple acknowledgment the law implies a promise" (*y*). It is sufficient if the acknowledgment or promise ascertain, either expressly or by reference, the amount due (*z*), or if it leave the amount to be supplied by

(*s*) *Haydon* v. *Williams*, 7 Bing. 166; 4 M. & P. 811, S. C.

(*t*) *Fearn* v. *Lewis*, 6 Bing. 349; 4 M. & P. 1, S. C.; *Scales* v. *Jacob*, 3 Bing. 638; 11 Moore, 553, S. C.; *Ayton* v. *Bolt*, 4 Bing. 105; 12 Moore, 305, S. C.; *Kennett* v. *Milbank*, 8 Bing. 38; 1 M. & Scott, 102, S. C.; *Brigstock* v. *Smith*, 1 C. & M. 483; *Spong* v. *Wright*, 9 M. & W. 629; *Cawley* v. *Turnell*, 12 C. B. 291; *Smith* v. *Thorne*, 18 Q. B. 134; *Rackham* v. *Marriott*, 25 L. J., Exch. 324; 1 H. & N. 234, S. C.; *Goate* v. *Goate*, 1 H. & N. 29; *Cornforth* v. *Smithard*, 5 H. & N. 13; 29 L. J., Exch. 228; *Everett* v. *Robertson*, 1 E. & E. 16; *Collinson* v. *Margesson*, 27 L. J., Exch. 305; *Godwin* v. *Culley*, 4 H. & N. 373.

(*u*) *Wainman* v. *Kynman*, 1 Exch. 118.

(*x*) *Tanner* v. *Smart*, 6 B. & C. 603; 9 D. & R. 549, S. C.; *Kennett* v. *Milbank*, 8 Bing. 38; 1 M. & Scott, 102, S. C; *Linsell* v. *Bonsor*, 2 Bing. N. C. 241; 2 Scott, 399, S. C.; *Humphreys* v. *Jones*, 14 M. & W. 2; see *Howcutt* v. *Bonser*, 3 Exch. 499. It does not appear necessary to declare on the conditional promise. *Irving* v. *Veitch*, 3 M. & W. 90; *Edmunds* v. *Downes*, 2 C. & M. 459; 4 Tyr. 173, S. C.; *Haydon* v. *Williams*, 7 Bing. 168; 4 M. & P. 811, S. C.; *Gardner* v. *McMahon*, 3 Q. B. 561.

(*y*) *Hart* v. *Prendergast*, 14 M. & W. 741; *Williams* v. *Griffith*, 18 L. J., Exch. 210; 3 Exch. 335, S. C.; *Phillips* v. *Phillips*, 3 Hare, 299; *Buckmaster* v. *Russell*, 4 L. T. (N. S.) 552; *Lee* v. *Wilmot*, 35 L. J., Ex. 175, L. R., 1 Ex. 364. But the acknowledgment must be made for the purpose of recognizing the debt. An acknowledgment made in other affairs and *alio intuitu* is not sufficient. *Cockerill* v. *Sparke*, 1 H. & Colt. 699; *Everett* v. *Robertson*, 1 E. & E. 16; *Rowe* v. *Hopwood*, 38 L. J., Q. B. 1; L. R., 4 Q. B. 1.

(*z*) *Lechmere* v. *Fletcher*, 1 C. & M. 623. The amount may be ascertained by extrinsic evidence. *Bird* v. *Gammon*, 3 Bing. N. C. 883; 5 Scott, 213, S. C.; *Waller* v. *Lacy*, 1 M. & Gr. 54.

CHAPTER XXVI.

parol evidence. Where, in an action against the acceptor of a bill of exchange, to take the case out of the statute, a letter by the defendant, promising "to pay the balance," was produced, but the letter did not specify its amount, the plaintiff was held entitled to recover nominal damages (*a*).

Evidence of date.

The date of a letter acknowledging a debt may be supplied by parol evidence (*b*).

Construction.

The construction of an ambiguous written document given in evidence, to save the statute, is for the court, and not for the jury (*c*).

Mutual running account.

Where there was a mutual and running account between the plaintiff and the defendant, any item on either side within six years would formerly have taken the whole account out of the statute, but an item in an account not mutual would not (*d*). But since Lord Tenterden's Act there must be either payment by the defendant, or a signed acknowledgment (*e*).

An account once stated is within the statute (*f*).

Devise.

A devise, in trust to pay a particular creditor, will take a debt out of the statute in equity. But a devise for the payment of debts in general will not revive a debt if the statute has run out (*g*), but will, in equity, prevent the statute from running out (*h*). In a recent case, Lord Brougham held, reversing a contrary decision of Sir John Leach, M. R., that a bequest of personal estate for the payment of debts will have the same effect (*i*).

(*a*) *Dickinson* v. *Hatfield*, 1 M. & Rob. 141; 5 C. & P. 46; S. C.; see *Kennett* v. *Milbank*, 8 Bing. 38; 1 M. & Scott, 102, S. C.

(*b*) *Edmunds* v. *Downes*, 2 C. & M. 459.

(*c*) *Morrell* v. *Frith*, 3 M. & W. 402. But it is a general rule, that parol evidence is admissible to explain technical terms in mercantile instruments, though the construction of the instrument is for the Court; ibid. *Bowman* v. *Horsey*, 2 M. & Rob. 85.

(*d*) *Rothery* v. *Munnings*, 1 B. & Ad. 15; *Cotes* v. *Harris*, B. N. P. 149; *Cranch* v. *Kirkman*, Peake, 121; *Catling* v. *Skoulding*, 6 T. R. 193.

(*e*) *Williams* v. *Griffiths*, 2 C., M. & R. 45. The exception of merchants' accounts applied only to an action of account, or to an action on the case for not accounting. *Inglis* v. *Haigh*, 8 M. & W. 769.

(*f*) *Farrington* v. *Lee*, 1 Mod. 268; *Renew* v. *Axton*, Carth. 3; *Chievly* v. *Bond*, 4 Mod. 105; *Tickell* v. *Short*, 2 Ves. sen. 239.

(*g*) *Burke* v. *Jones*, 2 Ves. & B. 275; *Gulliver* v. *Gulliver*, 1 H. & N. 174.

(*h*) *Hughes* v. *Wynn*, 1 Turn. & R. 307; *Hargreaves* v. *Mitchell*, 6 Madd. 326; *Moore* v. *Pitchell*, 22 Beav. 172; *Jacquet* v. *Jacquet*, 27 Beav. 332.

(*i*) *Jones* v. *Scott*, 1 Russ. & M. 255. But see *Spong* v. *Wright*, 9 M. & W. 629.

Acknowledgment by executors.

As a debt due from a testator's estate may exist, and yet the executor not be liable to pay, a mere acknowledgment of a debt by an executor is not sufficient to take a debt out of the statute; there must be an express promise (*k*). And it seems that a part payment by one executor will not take the case out of the statute as against his co-executor (*l*).

Notice in newspapers.

It seems, that a notice in the newspaper, by a personal representative, that he will pay all debts justly due from his testator, will prevent a debt from being barred by the Statute of Limitations (*m*).

Part payment.

A payment must appear to be the payment of a debt, of the debt for which the action is brought, and a part payment of a larger sum (*n*). "The principle," says Parke, B., "upon which part payment takes a debt out of the statute is that it admits a greater debt to be due at the time of the part payment. Unless it amounts to an admission that more is due, it cannot operate as an admission of any still existing debt" (*o*).

Appropriation of payments.

Where a debtor owes his creditor some debts from a period longer than six years, and others from a period within six years, and pays a sum without appropriating it to any particular debt, such payment is not a payment on account, to take out of the Statute of Limitations the debts due longer than six years, but the creditor may at any time apply such payments to the debts due longer than six years (*p*).

(*k*) *Tullock* v. *Dunn*, R. & Moo. 416; and see *Atkins* v. *Tredgold*, 2 B. & C. 23; 3 D. & Ry. 200, S. C.; *Fordham* v. *Wallis*, 22 L. J., Chan. 548.

(*l*) *Scholey* v. *Walton*, 12 M. & W. 510.

(*m*) *Jones* v. *Scott*, 1 Russ. & M. 253.

(*n*) *Tippets* v. *Heane*, 1 C., M. & R. 252; 4 Tyr. 772, S. C. But the sum need not then be ascertained. *Walker* v. *Butler*, 25 L. J., Q. B. 377; 6 E. & B. 506, S. C. In *Burn* v. *Boulton*, 15 L. J., C. P. 97; 2 C. B. 476, it was held that there was a difference between a debt on a promissory note, and a debt on a *quantum meruit*. That, therefore, if a payment is made, less than the amount of the note, it need not be proved by any expressions at the time of payment to be a part payment; and see *Worthington* v. v. *Grimsditch*, 7 Q. B. 479.

(*o*) *Worthington* v. *Grimsditch*, 7 Q. B. 479. See *Gowan* v. *Forster*, 3 B. & Ad. 510.

(*p*) *Mills* v. *Fowkes*, 5 Bing. N. C. 455; 7 Scott, 444, S. C.; *Waller* v. *Lacy*, 9 L. J., C. P. 217; 1 Scott, 186; 1 M. & Gr. 54, S. C.; *Nash* v. *Hodgson*, 1 Kay, 650; 23 L. J., Chan. 780, S. C.; but see 25 L. J., Chan. 186; 6 De G., M. & G. 474, and ante, p. 225.

Payment by bill.

The giving of a bill is sufficient as a payment or acknowledgment to obviate the statute (*q*). But the drawing of the bill is payment or acknowledgment at the time of the drawing, and not at the time of the payment by the drawee (*r*).

Payment by goods.

Goods treated as money are a sufficient payment (*s*).

Stamp on acknowledgment.

An acknowledgment, made necessary by the statute 9 Geo. 4, c. 14, is exempted by the eighth section from the Stamp Act, to which, *as an agreement*, it would otherwise have been subject (*t*). But if it amount to a promissory note, the exempting clause does not apply, and a stamp is necessary (*u*).

Statement of account.

A mere parol statement of an antecedent debt without any new contract or consideration made within six years before action brought, does not constitute a sufficient cause of action to prevent the operation of the Statute of Limitations (*x*). But where there are cross demands of which there is a mutual settlement by the statement of a balance, the case is taken out of the statute (*y*), because, as observed by Mr. Baron Alderson, "The truth is, that the going through an account, with items on both sides, converts the set-off into payments" (*z*).

Payment of interest.

Payment of interest is sufficient to take the principal out of the statute (*a*), but a payment of principal (except in

(*q*) *Turney* v. *Dodwell*, 3 E. & B. 136; *Irving* v. *Veitch*, 3 M. & W. 90.

(*r*) *Gowan* v. *Forster*, 3 B. & Ad. 507.

(*s*) *Hart* v. *Nash*, 2 C., M. & R. 337; *Hooper* v. *Stevens*, 7 C. & P. 260; 4 Ad. & E. 71; 5 N. & M. 635; 1 Har. & W. 480, S. C.; and see as to the evidence, *Moore* v. *Strong*, 1 Bing. N. C. 441; *Bodyer* v. *Archer*, 10 Exch. 333.

(*t*) *Morris* v. *Dixon*, 4 Ad. & E. 845; 6 N. & M. 438, S. C.

(*u*) *Jones* v. *Ryder*, 4 M. & W. 32; *Holmes* v. *Mackrell*, 3 C. B. N. S. 789; *Parmiter* v. *Parmiter*, 30 L. J., Ch. 508, per Lord Campbell.

(*x*) *Jones* v. *Ryder*, 4 M. & W. 32, overruling *Smith* v. *Forty*, 4 C. & P. 126.

(*y*) *Ashby* v. *James*, 11 M. & W. 542; *Worthington* v. *Grimsditch*, 7 Q. B. 479; *Pott* v. *Clegg*, 16 M. & W. 327; 16 L. J., Exch. 210.

(*z*) *Bodyer* v. *Archer*, 10 Exch. 333; *Amos* v. *Smith*, 31 L. J., Exch. 423; *Worthington* v. *Grimsditch*, 7 Q. B. 479. See, however, *Clark* v. *Alexander*, 13 L. J., C. P. 133. One item only is enough. *Knowles* v. *Mitchell*, 18 East, 249; *Highmore* v. *Primrose*, 5 M. & S. 65. See *Lemere* v. *Elliott*, 6 H. & N. 656.

(*a*) *Purdon* v. *Purdon*, 10 M. & W. 562; *Bamfield* v. *Tupper*, 7 Exch. 27; *Maber* v. *Maber*, 36 L. J., Ex. 70; L. R., 2 Ex. 153.

the case of bills or notes) will not revive a claim for interest (*b*).

When the acknowledgment must be made.

Secondly, as to the time when the acknowledgment must be made.

Except in the cases which have been mentioned of devises and bequests for the payment of debts, it makes no difference whether the promise, acknowledgment or payment were made before or after the expiration of six years. An acknowledgment which prevents the running out of the statute will also revive a debt already barred.

Must be made before action brought.

It was formerly held, that the acknowledgment might be after action brought (*c*). But as the acknowledgment is now considered as the ground of action and the subject of the declaration, the promise, acknowledgment or payment must clearly be before action brought (*d*).

Payment of money into Court.

Payment of money into Court will not take a bill or note out of the statute, except as to the amount paid in (*e*).

By whom.

Thirdly, as to the person by whom the promise, acknowledgment or payment may be made.

It may be made by an agent (*f*), and therefore by a wife acting as agent (*g*), and by one partner even after dissolution of the partnership (*h*), if he makes a payment. But if an agent exceed his authority in making the payment, it will

(*b*) *Collier* v. *Willock*, 4 Bing. 313; 12 Moore, 557, S. C.; *Bealy* v. *Greenslade*, 2 C. & J. 61.

(*c*) *Yea* v. *Fouraker*, 2 Burr. 1099; *Lloyd* v. *Maund*, 2 T. R. 760; *Rucker* v. *Hannay*, 4 East, 604, n.

(*d*) *Tanner* v. *Smart*, 6 B. & C. 603; 9 D. & R. 549, S. C.; *Rew* v. *Pettet*, 1 Ad. & E. 196; 3 N. & M. 456, S. C.; *Bateman* v. *Pinder*, 3 Q. B. 574.

(*e*) *Reid* v. *Dickons*, 5 B. & Ad. 499; 2 N. & M. 369, S. C.; and see *Long* v. *Greville*, 3 B. & C. 10; 4 D. & R. 632, S. C.

(*f*) *Burt* v. *Palmer*, 5 Esp. 145. But an acknowledgment in writing, signed by an agent, has been held insufficient. *Hyde* v. *Johnson*, 2 Bing. N. C. 776; 3 Scott, 289, S. C. *Sed quære.* This case, however, has been several times recognized, and a question has ever been made whether a written acknowledgment, signed by one of several partners in trade, has any other effect than an acknowledgment by one of several ordinary joint contractors. *Clark* v. *Alexander*, 13 L. J., C. P. 133. But now by 19 & 20 Vict. c. 97, s. 13, the signature of an agent suffices.

(*g*) Evidence of admissions by an agent may be admissible without calling the agent. *Palethorpe* v. *Furnish*, 2 Esp. 511; *Anderson* v. *Sanderson*, 2 Stark. 204; Holt, N. P. C. 591, S. C.; *Gregory* v. *Parker*, 1 Camp. 394; but see *Gibson* v. *Baghott*, 5 C. & P. 211.

(*h*) *Wood* v. *Braddick*, 1 Taunt. 104.

CHAPTER XXVI.

not take the debt out of the statute (*i*). It may be made by an infant for necessaries (*k*). Payment of interest by an indorser of a promissory note does not take the note out of the statute as against the maker (*l*).

By joint contractors.

The 9 Geo. 4, c. 14, introduced, as we have seen, a distinction between acknowledgments and promises *by words only* (*m*), and payments. The former, in the case of joint contracts, affected only the party acknowledging; the latter retained their former effect.

Where there is a joint contract, the parties were, under the old Statute of Limitations, respectively agents for each other in respect of that contract, till the joint liability had determined (*n*). In a joint action, therefore, against the makers of a joint and several promissory note, a *payment* by one would have revived the debt against the others (*o*). So, if the action had been brought against one alone, *payment* by his companion would have bound the defendant (*p*), though made fraudulently (*q*). And it made no difference that the statute had run out, when the payment by the other joint contractor was made (*r*). But after the joint liability had been determined by the death of one of the parties, payment by the survivor would not have taken the note out of the statute against the executors of the deceased (*s*); nor would a payment by the executor of the deceased have affected the survivor (*t*). And it has been held, that nothing short of an express promise will take a debt out of the statute against an executor (*u*). And if the plaintiff rely on a *payment*, it must distinctly appear that the payment was made by the executor in his representative, and not in his personal, capacity (*x*). And it seems that *payment* by one executor

(*i*) *Linsell* v. *Bonsor*, 2 Bing. N. C. 241; 2 Scott, 399, S. C.

(*k*) *Willins* v. *Smith*, 4 E. & B. 180.

(*l*) *Harding* v. *Edgecumbe*, 28 L. J., Exch. 313.

(*m*) As to the effect of an acknowledgment by an executor, see *Fordham* v. *Wallis*, 22 L. J., Chan. 548. See *Emery* v. *Day*, 1 C., M. & R. 249; 4 Tyr. 695, S. C.

(*n*) *Wood* v. *Braddick*, 1 Taunt. 104.

(*o*) *Perham* v. *Raynal*, 2 Bing. 306; 9 Moore, 556, S. C. Though made by a partner after a dissolution of partnership. *Goddard* v. *Ingram*, 12 L. J., Q. B. 9; 3 Q. B. 839, S. C.

(*p*) *Whitcomb* v. *Whiting*, Doug. 629, overruling *Bland* v. *Haselrig*, 2 Vent. 151; and see *Burleigh* v. *Stott*, 8 B. & C. 36; 2 M. & R. 93, S. C.

(*q*) *Goddard* v. *Ingram*, 3 Q. B. 839.

(*r*) *Channell* v. *Ditchburn*, 5 M. & W. 494.

(*s*) *Atkins* v. *Tredgold*, 2 B. & C. 23; 3 D. & R. 200, S. C.

(*t*) *Slater* v. *Lawson*, 1 B. & Ad. 396.

(*u*) *Tullock* v. *Dunn*, 1 R. & M. 416.

(*x*) *Scholey* v. *Walton*, 12 M. & W. 510; see, however, *Griffin* v. *Ashby*, 2 Car. & K. 139.

would not of itself have taken the case out of the statute as against his co-executor (*y*). When one of two makers of a joint and several note made his companion his executor, and died, and the survivor afterwards paid interest on the note out of his own pocket, this being an acknowledgment in his personal, and not in his representative, capacity, was held not to revive the debt as against the executors (*z*). But the executors of the deceased were bound, if the payment were made by the survivor before the death of their testator (*a*).

So, where a joint note was made by a man and a woman, and the woman afterwards married, and a joint action was brought against husband and wife and the other maker, laying the promise by the other maker and the woman *dum sola*, and the defendants pleaded that the action did not accrue within six years, evidence of a promise by the other maker after the marriage was held to be out of the issue (*b*).

The distinction, however, between the operation of payments and acknowledgments, is abolished by the 19 & 20 Statute 19 & 20 Vict. c. 97.

(*y*) Ibid.

(*z*) *Atkins* v. *Tredgold*, 2 B. & C. 23; 3 D. & Ry. 200, S. C.

(*a*) *Burleigh* v. *Stott*, 8 B. & C. 36; 2 M. & Ry. 93, S. C.

(*b*) *Pittam* v. *Foster*, 1 B. & C. 248; 2 D. & Ry. 363, S. C. When a single woman gives a promissory note and marries, and the note is more than six years old, there are great difficulties in suing, although acknowledgments and payments have been made within the six years, but after marriage. A husband can only be sued for the debt of his wife *dum sola* during coverture; Com. Dig. Baron and Feme, C. 2; and therefore a promise *by him* to pay would extend his liability, and is void unless upon a new consideration. *Mitchinson* v. *Hewson*, 7 T. R. 348. An acknowledgment or payment, therefore, by the husband, would not suffice. An acknowledgment or promise by the husband and wife, or by the wife alone, could have no operation, the wife being incompetent to contract. *Morris* v. *Norfolk*, 1 Taunt. 212. If the husband's promise were considered as a promise to pay during coverture, it would still extend his liability, for an action for not paying during coverture would lie after the coverture. If, as a promise to pay, provided judgment be recovered during coverture (for the judgment fixes the husband with the debt, Com. Dig. Baron and Feme, B. 2), it would still be subject to these exceptions: first, there would be no cause of action till judgment recovered, which is absurd; secondly, the judgment in such an action, being against the husband alone, would charge him to a greater extent than a judgment against husband and wife; for, on a joint judgment, if the husband survive, real execution would be against his wife's lands as well as his; and if the wife survive, personal execution would, it is conceived, survive against her, and real execution would still be joint, whereas on a judgment against the husband alone he is subject, notwithstanding his pre-decease, to personal execution, and has no contribution in real execution.

Vict. c. 97, s. 14, which statute restrains the effect of the acknowledgment implied from payment and confines it to the party making it, as the 9 Geo. 4, c. 14, had restrained the effect of an express acknowledgment. But the statute is not retrospective (*c*).

In cases of bankruptcy and insolvency.

It has been held, that payment of a dividend under a commission of bankruptcy against one of two makers of a joint and several note would take the note out of the statute against the solvent maker (*d*). But that is doubtful, for it has since been more correctly held that payment of a dividend by the assignees of an insolvent will not take a note out of the statute as against his co-makers, for there is no acknowledgment of more being due (*e*).

To whom.

Fourthly, as to the person to whom the acknowledgment, promise or payment must be.

It has been held, that the acknowledgment or promise need not, in point of fact, be made to the plaintiff, but may be made to a stranger (*f*). Therefore, a letter by one joint and several maker of a promissory note to another, has been decided to take the note out of the statute as against the writer (*g*); and from the cases above cited, it should seem it would, before the 9 Geo. 4, c. 14, have had the same effect as against the other maker to whom it was addressed. So also, in an action by indorsees against acceptors of a bill, a deed between the acceptors and third persons, reciting that the bill was outstanding and unpaid, was held to take it out of the statute (*h*). So an acknowledgment to a prior holder of a bill or note, enures to the benefit of a subsequent holder (*i*). So a payment to an administrator, under void

(*c*) *Jackson* v. *Woolley*, 27 L. J., Q. B. 448. This statute had been held to be retrospective, and to take away the effect of a payment by a joint contractor as against his companion, though made before the statute; *Thompson* v. *Waithman*, 26 L. J., Chan. 134; *Jackson* v. *Woolley*, 27 L. J., Q. B. 181.

(*d*) *Davies* v. *Edwards*, 21 L. J., Exch. 4.

(*e*) *Jackson* v. *Fairbank*, 2 H. Bl. 340, recognized in *Perham* v. *Raynal*, 2 Bing. 306; 9 Moore, 556, S. C.; but see *Brandram* v. *Wharton*, 1 B. & Al. 463.

(*f*) *Peters* v. *Brown*, 4 Esp. 46. As to payment to an agent of the holder, see *Megginson* v. *Harper*, 2 C. & M. 322; 4 Tyr. 94, S. C.

(*g*) *Halliday* v. *Ward*, 3 Camp. 32.

(*h*) *Mountstephen* v. *Brooke*, 1 B. & Ald. 224.

(*i*) *Gale* v. *Capern*, 1 Ad. & Ell. 102; 3 N. & M. 863, S. C.; see, however, *Cripps* v. *Davis*, 12 M. & W. 159.

letters of administration, will take a note out of the statute in an action by an administrator under valid letters (*k*).

What evidence is required of the acknowledgment.

Lastly, as to the evidence by which a promise, acknowledgment, or payment must be proved, in order to its taking a debt out of the statute.

Where the same debt is secured by different instruments payment of interest on one will take the others out of the statute (*l*).

Signature of party chargeable.

The statute 9 Geo. 4, c. 14, requires that an acknowledgment or promise *by words only* should be in writing, signed by the party chargeable (*m*).

Effect of verbal admission.

It was formerly held, that a promise or payment could not be proved by a verbal or unsigned written acknowledgment (*n*). But it was also held, that the appropriation of the payment to a particular debt might (*o*). Payment may, however, now be proved like any other fact (*p*).

Statute retrospective.

This part of the statute is retrospective, and therefore an oral acknowledgment or promise, though made before 1st January, 1829, when the statute came into operation, is inadmissible in evidence (*q*).

Entries on the bill.

Entries on the bill, of payment of interest or principal, in the handwriting of the plaintiff, were formerly evidence to take the debt out of the statute; but now the 9 Geo. 4, c. 14, s. 3, enacts, that no indorsement or memorandum of any payment, written or made after the 1st January, 1829, upon any promissory note, bill of exchange or other writing, by or on behalf of the party to whom such payment shall be made, shall be deemed sufficient proof of such payment, so as to take the case out of the operation of the statute. It

(*k*) *Clark* v. *Hooper*, 10 Bing. 480; 4 Moore & S. 353, S. C.

(*l*) *Dowling* v. *Ford*, 11 M. & W. 329.

(*m*) See ante, p. 346.

(*n*) *Willis* v. *Newham*, 3 Y. & J. 518; *Baildon* v. *Walton*, 1 Exch. 632; *Waters* v. *Tompkins*, 2 C., M. & R. 723; 1 Tyr. & Gr. 137, S. C.; *Bayley* v. *Ashton*, 4 P. & D. 204; *Maghee* v. *O'Neil*, 7 M. & W. 531; see, however, *Eastwood* v. *Saville*, 9 M. & W. 615.

(*o*) *Waters* v. *Tompkins*, supra; *Bevan* v. *Gething*, 3 Q. B. 740; *Baildon* v. *Walton*, 1 Exch. 632.

(*p*) *Cleave* v. *Jones*, in error, 6 Exch. 573.

(*q*) *Towler* v. *Chatterton*, 6 Bing. 258; 3 M. & P. 619, S. C.; *Hilliard* v. *Lenard*, Moo. & M. 297.

CHAPTER XXVI.

may now, therefore, be advisable that any indorsement of payment of interest, or part payment of principal, should be written by the debtor and signed by both parties; signed by the creditor, as evidence in favour of the debtor; written and signed by the debtor, to keep the security alive in favour of the creditor.

Indorsements of the payment of interest are presumed to have been written at the time they bear date (*r*).

As an entry by a person deceased against his interest is evidence in an action brought by his personal representatives, such an entry of payment of interest is admissible in an action by them on a bill or note for the purpose of proving payment. But if the entry be on the bill or note itself, payment so proved, though admissible, would not by the express words of the statute be sufficient to take the debt out of the statute. Yet if the entry were on some other paper it seems it would not only be admissible but sufficient. For the expression "other writing" in the statute only means any other writing containing the contract (*s*).

HOW THE STATUTE IS TO BE TAKEN ADVANTAGE OF.

Eighthly, as to the mode in which the statute is to be taken advantage of.

A public act need not in general, before the recent alterations of the law (*t*), have been pleaded. But to this rule (except in an action of ejectment) the Statute of Limitations, 21 Jac. 1, c. 16, was an exception. It was once held, that the statute need not be pleaded where it appeared on the face of the declaration that the plaintiff was too late (*u*). But it was afterwards settled that it must, even in that case, be pleaded; for peradventure the plaintiff may be within one of the saving clauses (*x*).

It must now be pleaded in all cases.

Form of plea.

There are two modes of pleading the Statute of Limitations: "*That the defendant did not undertake within six years;*"—"*that the action did not accrue within six years*" (*y*).

(*r*) *Smith* v. *Battens*, 1 M. & Rob. 341.

(*s*) *Bradley* v. *James*, 22 L. J., C. P. 193; 13 C. B. 822, S. C.

(*t*) R. H. T. 4 Will. 4.

(*u*) *Brown* v. *Hancock*, Cro. Car. 115.

(*x*) *Hawkings* v. *Billhead*, Cro. Car. 464; *Puckle* v. *Moor*, 1 Vent. 191; *Lee* v. *Rogers*, 1 Lev. 110; *Gould* v. *Johnson*, 2 Ld. Raym. 838.

(*y*) Before the Uniformity of Process Act, the plaintiff might (except in actions by original) at his election, have treated either the writ or the bill as the commencement of the suit, and there-

Wherever the contract is executory, the former plea is bad (*z*).

The latter form is the safest and best plea in all actions, whether on contracts or for wrongs (*a*).

Replication to a plea of set-off.

To a plea of set-off, the Statute of Limitations must be replied specially (*b*).

What a replication of the statute admits.

A replication of the statute admits all the facts alleged in the plea, and only raises the question whether the cause of set-off accrued to the defendant within six years (*c*). Thus, where the defendant pleaded that the plaintiff had given his promissory note to C., that C. was dead, and that P. was C.'s administrator, who had before the action indorsed the note to the defendant, and the plaintiff replied that the cause of set-off had not accrued to the defendant within six years, it was held that all the facts stated in the plea were admitted (*d*).

Replication to a plea of the statute.

A replication in assumpsit to a plea of the statute must be consistent with the promises laid in the declaration. For example, if the original promise were absolute, the promise laid in the replication must not be conditional (*e*).

Replication of the saving clauses.

The plaintiff may reply to a plea of the statute, that he is within the saving clause, or rather such parts as are unrepealed.

WHEN INDEPENDENTLY

Lastly, independently of the statute, if a note be twenty years old (*f*), it will be presumed to have been paid, in the

fore might have pleaded that the action did not accrue within six years before the exhibiting of the bill, or before the commencement of the suit, and the latter is the proper mode of pleading now. C. L. P. Act, 1852, Sched. (B.)

A writ should not be replied specially, but given in evidence. *Dickenson* v. *Teague*, 1 C., M. & R. 241.

(*z*) *Gould* v. *Johnson*, 2 Salk. 422; 2 Ld. Raym. 838, S. C.

(*a*) 1 Saund. 33, *f*. A plea stating that a debt accrued more than six years ago, without stating that it did not accrue within the six years, is bad. *Bush* v. *Martin*, 2 H. & Colt. 311.

(*b*) *Chapple* v. *Durston*, 1 C. & J. 1.

(*c*) *Gale* v. *Capern*, 1 Ad. & Ell. 102; 3 N. & M. 863, S. C.

(*d*) Ibid.

(*e*) *Tanner* v. *Smart*, 6 B. & C. 606; 9 D. & Ry. 549, S. C.; *Haydon* v. *Williams*, 7 Bing. 168; 4 M. & P. 811, S. C.

(*f*) Such, for two hundred years, has been the common law as to a bond. The defence was introduced into Ireland by statute 8 Geo. 1, c. 4, and into England by the 3 & 4 Will. 4, c. 42, s. 3.

CHAPTER XXVI.

OF THE STATUTE, LAPSE OF TIME IS A BAR.

absence of circumstances tending to repel the presumption (*g*).

The lapse of thirteen years has been held sufficient to raise a presumption of the repayment of a loan not secured by a note (*h*).

(*g*) *Duffield* v. *Creed*, 5 Esp. 52.

(*h*) *Cooper* v. *Turner*, 2 Stark. 497.

CHAPTER XXVII.

OF THE LAW OF SET-OFF AND MUTUAL CREDIT IN RELATION TO BILLS AND NOTES.

Nature of Set-off . . 359
Unknown to the Common Law 360
Recognized in Equity . 360
Introduced by Statute . 360
Division of the Subject . 361
THE GENERAL STATUTES OF SET-OFF . . . 361
The Sums to be set off must be Debts . . . 361
Legal Debts . . . 361
Subsisting Debts . . 362
Actually due . . . 362
And at Time of Trial . 362
Mutual 362
Statutes Permissive, not Imperative . . . 363
Pleading 364
SET-OFF IN BANKRUPTCY 364
When the mutual Credit must have existed . . 364
Fraudulent Set-off . . 365
Attempt to deprive of Set-off 366
MUTUAL CREDIT . . 366
Need not be of Money . 366
The Debts need not be due . 366
Mutual Credit need not be intended . . . 367
Breach of Trust . . 367
Does not extinguish a Lien 367
How mutual Credit is to be taken Advantage of . 368
How under Companies Act 368
SET-OFF IN EQUITY . 368
OF CASES WHERE A STIPULATION, NOT THE SUBJECT OF A SET-OFF, IS A BAR TO THE ACTION 369

Nature of set-off.

COMPENSATIO, in the Roman law, corresponds with set-off in the English law: but the provisions in the civil law, for setting one demand against another, are more liberal and extensive than in ours. *Compensatio* is defined by the civilians, DEBITI ET CREDITI INTER SE CONTRIBUTIO (*a*).

Set-off signifies the subtraction, or taking away of one demand from another opposite or cross demand, so as to extinguish the smaller demand and reduce the greater by the amount of the less, or if the opposite demands are equal, to extinguish both. It was also, formerly, sometimes called stoppage, because the amount sought to be set off was *stopped*, or deducted from the cross demand.

Set-off is in all cases useful to prevent circuity of action: but where one of the parties is dead, insolvent, bankrupt, or removed beyond the jurisdiction of the English Courts, it is absolutely necessary, to prevent gross injustice.

(*a*) Dig. 16, 2, 1.

CHAPTER XXVII.

Unknown to the common law.

Yet it should seem that set-off is unknown to the common law, perhaps because it was thought very inconvenient to try two cross demands in a single action, and because, in the early stages of our jurisprudence and commerce, its necessity was not so apparent. Some writers have indeed held, that there is such a thing as a set-off by action at common law (*b*); but it is conceived that the authorities cited in support of this doctrine are cases rather of conditional contract, or of payment, than of set-off. It is true that Lord Mansfield says (*c*), that "where the nature of the transaction consists in a variety of receipts and payments, the law allows the balance only to be the debt;" but that is, because the entries on each side of an account current are by the usage and understanding of trade mutual payments rather than mutual cross demands.

Where, indeed, parties *agree* that mutual debts shall be set off, that agreement amounts to payment. But the law itself does not apply mutual payments in extinguishment of each other (*d*).

Recognized in equity.

But though the practice of set-off was unknown to courts of law before the statutes, it was recognized in courts of equity long before (*e*): and the want of it at law was found productive of great injustice. "The natural sense of mankind," says Lord Mansfield, "was first shocked at this doctrine in the case of bankrupts; they thought it hard that a person should be bound to pay the whole that he owed to a bankrupt, and receive only a dividend of what the bankrupt owed him."

Introduced by statute.

This defect, therefore, was supplied in the case of bankruptcy, by the statute 4 Anne, c. 17 (*f*). Afterwards by the statutes of Geo. 2, the same equitable provision was made for the set-off of debts generally in the courts of law, and especially after the death of one of the parties. Then the Lords' Act, and the Acts for the Relief of the Insolvent Debtors, adopted the same provision; and, lastly, the courts of law, anxious to do justice at the termination as well as at

(*b*) Montague on Set-off, pp. 1, 2.

(*c*) *Green* v. *Farmer*, 1 W. Bl. 651; 4 Burr. 2214, S. C.

(*d*) See the American authorities, Byles on Bills, 5th American ed. p. 530.

(*e*) *In equity* if there be cross demands and one demand be equitable, and the other legal, there is set-off, if there would have been set-off at law, had both the demands been legal. *Freeman* v. *Lomas*, 9 Hare, 109; *Cochrane* v. *Green*, 30 L. J., C. P. 97; 9 C. B., N. S. 443, S. C.; *Wilson* v. *Gabriel*, 4 B. & Smith, 243.

(*f*) *Green* v. *Farmer*, 1 W. Bl. 651; 4 Burr. 2214, S. C.

the commencement of a suit, in the exercise of their equitable jurisdiction over their respective suitors, have allowed the set-off of costs and judgments.

Division of the subject.

In examining the subject of set-off and mutual credit, in its relation to negotiable instruments, let us consider, first, the provision of the general statutes of set-off; secondly, of the Bankrupt Act, and the Acts for the Relief of Insolvent Debtors; and thirdly, the doctrine of the Courts of equity. The fourth branch of the subject, I mean the set-off of costs and judgments in different Courts, is, perhaps, foreign to the design of this Treatise; but it may be proper to notice, lastly, a few cases, in which a stipulation, though not properly the subject of a set-off, is yet held to be a bar to the action.

THE GENERAL STATUTES OF SET-OFF.

First, The general statutes of set-off are, the 2 Geo. 2, c. 22, s. 13, and the 8 Geo. 2, c. 24, s. 4. These statutes only give a set-off in case of mutual *debts;* that is, of ascertained money demands (*g*).

The sums to be set off must be debts.

Hence it follows, that there can be no set-off unless the demand for which the action is brought, and the counter-demand sought to be set off, are both of them debts properly so called. Therefore, there can be no set-off at all to an action in form *ex delicto*, as trover, nor to an action *ex contractu*, unless brought for a liquidated sum (*h*). Therefore, also, a guarantee cannot be set off (*i*).

Legal debts.

The subject of set-off at law must be a legal, and not a mere equitable debt; and, therefore, the assignee of a bond cannot set off the amount secured by that instrument (*k*), but the indorsee or assignee of a bill or note may set it off, because negotiable instruments are assignable at law.

(*g*) Though secured by a penalty, 8 Geo. 2, c. 24, s. 5. See *Collins* v. *Collins*, 2 Burr. 820; *Lee* v. *Lester*, 7 C. B. 1008.

(*h*) In America it has been held that damages are unliquidated where there is no criterion provided by the parties, or by the law operating on the contract, by which to ascertain the amount. But in Pennsylvania and Illinois an unliquidated cross demand, arising from a distinct contract, may be set off. This arises from the absence of a separate administration of equity. Byles on Bills, 5th American ed. p. 525.

(*i*) *Cranford* v. *Stirling*, 4 Esp. 207; *Morley* v. *Inglis*, 4 Bing. N. C. 58; 5 Scott, 314, S. C. See *Crampton* v. *Walker*, 30 L. J., Q. B. 19.

(*k*) *Wake* v. *Tinkler*, 16 East, 36. But an equitable debt may be set off by an equitable plea. See ante, p. 360, n. (*e*).

CHAPTER XXVII.

Subsisting debts.

It must be a subsisting legal debt; therefore, a debt barred by the Statute of Limitations cannot be set off (*l*). So a debt, satisfied in contemplation of law by a discharge of the debtor out of execution, cannot be set off (*m*). But the defendant may set off a debt due to him, though he have obtained a verdict against the plaintiff in a former action (*n*), or a judgment, or though he have even taken him in execution, if the debtor has not been discharged (*o*). But the debt to be set off need not necessarily be one for which an action could be brought. Therefore an unsigned attorney's bill may be set off (*p*). And the debt must exist not only at the commencement of the action, but at the time of plea pleaded, and the plea must aver that the plaintiff *still* is indebted to the defendant (*q*).

Due at the commencement of the suit.

The demand must have been a debt strictly so called; that is, a debt actually due and payable at the commencement of the action (*r*). Therefore a bill or note cannot be set off unless due, and in the defendant's hands before the issuing of the writ (*s*).

And at the time of trial.

And it must be a debt still due at the time of trial. Therefore it may be replied that since the plea the plaintiff has paid the debt (*t*).

Mutual.

The debts must be mutual; for the statutes only authorize the setting off of mutual debts.

Therefore, in the case of partnership debts, if the firm sue, only a debt due from all the partners can be set off. So, if the firm be sued, they cannot set off a debt due to one or more of the partners, but not to all (*u*). But one partner may *settle* a debt due to the firm, by setting off against it a debt due from himself (*x*), and though, as it seems, he should in so doing be acting in fraud of his co-partners. The debts

(*l*) Bull. N. P. 180.

(*m*) *Jacques* v. *Withy*, 1 T. R. 557.

(*n*) *Baskerville* v. *Brown*, 2 Burr. 1229.

(*o*) *Peacock* v. *Jeffrey*, 1 Taunt. 426.

(*p*) *Harrison* v. *Turner*, 16 L. J., Q. B. 295; 10 Q. B., 482, S. C.

(*q*) *Dendy* v. *Powell*, 3 M. & W. 442.

(*r*) *Richards* v. *James*, 2 Exch. 471.

(*s*) *Evans* v. *Prosser*, 3 T. R. 186; and see *Braithwaite* v. *Coleman*, 4 Nev. & Man. 654.

(*t*) *Eyton* v. *Littledale*, 18 L. J., Exch. 369; 4 Exch. 159, S. C.; *Briscoe* v. *Hill*, 10 M. & W. 735.

(*u*) But the Roman law was otherwise; one partner might claim a set-off due to his partner "ex causa societatis." Dig. 45, 2, 10; Cujacius in Cod. 4, 31, 9.

(*x*) *Wallace* v. *Kelsall*, 7 M. & W. 264.

and credits of a firm survive at law to the surviving partner, and a Court of law will not take notice of his equitable claims and liabilities. His separate debts and credits, and his debts and credits as representative of the firm, are considered as of the same nature, and may, therefore, be set off against one another. Thus, when a *surviving* partner sues for a partnership debt, a separate debt due from him may be set off. So, when he sues for his separate debt, a debt due from the former partnership may be set off. When he is sued for a partnership debt, he may set off a debt due to him individually. And when he is sued for a separate debt, may set off a debt due to the firm (*y*). And if one of two joint contractors is sued alone, he may plead in bar that the promises were made by him and another jointly, and that a set-off is due from the plaintiff to him and his co-contractor (*z*).

The indorsee of an overdue note is not liable to the set-off of a debt due from his indorser to the maker (*a*).

To examine minutely what are mutual debts when the characters of principal and agent, of executors and administrators (*b*), and of husband and wife intervene, would be to deviate from our main subject (*c*).

If a note be given to a married woman, the husband may, as we have seen, either sue alone or join his wife. If he sue in his own name, he is not liable to a set-off due from his wife, *dum sola*, but he is to a set-off due from himself (*d*). If he join her, it should seem, he is liable to a set-off due from his wife, but he is not to one due from himself (*e*).

Statutes permissive, not imperative.

The general statutes of set-off are permissive, not imperative. Therefore, if a defendant have a cross demand, he may either set it off, or bring a cross action for it, at his option (*f*).

And he may (supposing his demand to be greater than the demand against which he sets it off), plead his set-off and bring an action at the same time for the same sum. If he has a verdict in the action where he is plaintiff, and also a verdict on his plea of set-off in the action where he is defend-

(*y*) *Slipper* v. *Stidstone*, 1 Esp. 47; 5 T. R. 493, S. C.

(*z*) *Stackwood* v. *Dunn*, 3 Q. B. 822.

(*a*) *Burrough* v. *Moss*, 10 B. & C. 558.

(*b*) See *Blakesley* v. *Smallwood*, 8 Q. B. 538; *Rees* v. *Watts*, 11 Exch. 410; *Mardall* v. *Thellusson*, 6 E. & B. 976.

(*c*) See, however, Byles on Bills, 5th American ed. p. 529.

(*d*) *Burrough* v. *Moss*, 10 B. & C. 558.

(*e*) Ibid.

(*f*) *Baskerville* v. *Brown*, 2 Burr. 1229.

CHAPTER XXVII.

ant, he must consent to reduce his verdict in the action where he is plaintiff, by the amount to which he has made his set-off available in the action where he is defendant (*g*).

Pleading.

A discharge under the Insolvent Debtors' Act must be replied specially (*h*).

Under the informal replication that the plaintiff never was indebted, he cannot prove payment, as he might under the common replication that he was not, nor is, indebted (*i*). The plaintiff may under the common replication show want of mutuality (*j*).

Particulars of set-off.

If a defendant does not deliver particulars of set-off in compliance with a Judge's order, he is precluded from giving evidence of it at the trial (*k*).

SET-OFF IN BANKRUPTCY.

Secondly, Set-off under the Bankrupt Act.

When the mutual credit must have existed.

Set-off in bankruptcy was first given by the 4th Anne, c. 17, s. 11, re-enacted by 5 Geo. 2, c. 38. These statutes enact that the mutual credit must have been before the bankruptcy ; and, therefore, it was decided, where a debtor to the estate claimed to set off notes of the bankrupt, that it was for him to show that he took the notes before the act of bankruptcy (*l*). The 46 Geo. 3, c. 135, s. 3, enacted, that one debt or demand might be set off against another, notwithstanding a prior act of bankruptcy, provided the credit were given to the bankrupt two months before the date of the commission, and provided the person claiming the set-off had no notice of an act of bankruptcy, or that the bankrupt was insolvent, or had stopped payment. The 6 Geo. 4, c. 16, s. 50 (repealed, but re-enacted by the 12 & 13 Vict. c. 106, s. 171) (*m*), goes still further, and allows all debts to be set off, whether contracted before or after the act of bankruptcy, provided no notice of a specific act of bankruptcy when the credit was given can be brought home to the debtor. In case, therefore, of a country banking-house

(*g*) *Baskerville* v. *Brown*, 2 Burr. 1229.

(*h*) *Ford* v. *Dornford*, 8 Q. B. 583.

(*i*) *Stockbridge* v. *Sussams*, 3 Q. B. 239; *Miller* v. *Atlee*, 3 Exch. 799.

(*j*) *Arnold* v. *Bainbridge*, 9 Exch. 153.

(*k*) *Ibbett* v. *Leaver*, 16 M. & W. 770; *Young* v. *Geiger*, 18 L. J., C. P. 43; 6 C. B. 552, S. C.

(*l*) *Marsh* v. *Chambers*, 2 Stra. 1234; *Dickson* v. *Evans*, 6 T. R. 57; *Oughterlony* v. *Easterby*, 4 Taunt. 888; *Moore* v. *Wright*, 6 Taunt. 517; 2 Marsh. 209, S. C.

(*m*) Not repealed or altered in this respect, by the 24 & 25 Vict. c. 134.

stopping payment, there does not now seem any necessary legal objection to a set-off by the debtors of a firm, of notes bought up by them in the interval between the stopping payment and the issuing of the commission. If, indeed, when the doors and windows of a bank are closed, the bankers either withdraw from the bank, or shut themselves up in it, and so avoid any communication with their creditors, they commit an act of bankruptcy by *keeping house or absenting themselves*, with intent to defeat their creditors (*n*). But if, on stopping payment and closing the bank, they are, from illness, unable to be seen, or the creditors are referred to them at their banking-house, or at their private houses, the mere circumstance of stopping payment is not an act of bankruptcy; and notes taken by a debtor to the firm, after knowledge that the firm had stopped payment, may be set off (*o*). Notice of acts of bankruptcy by some members of a banking firm, without notice of an act of bankruptcy by another member, will take away the right to set off (*p*). But a man cannot buy up and set off notes and bills, known by him to have been given by the bankrupts for the accommodation of other persons (*q*).

Fraudulent set-off.

A debtor to the bankrupt's estate cannot set off a bill or note transferred to him by the real owner, even before the bankruptcy, for the mere purpose of being set off against a demand by the bankrupt's estate, so that the real owner might receive 20*s.* in the pound (*r*). For in such a case the debtor is a mere trustee for others, and having no real cross demand of his own against the estate, cannot be allowed to set off another man's (*s*). But if the notes were handed over to the debtor to the estate for an antecedent debt due to him from the owner of the notes, they may be set off (*t*). Mere legal debts, without any beneficial interest in the creditor, may be set off under the general statutes of set-off, but not under the mutual credit clause. "The object of the mutual credit clause," says Parke, B., "is to do sub-

(*n*) *Cumming* v. *Baily*, 6 Bing. 363; 4 Moo. & P. 36, S. C.

(*o*) *Hawkins* v. *Whitten*, 10 B. & C. 217; 5 Man. & R. 219, S. C.; *Dickson* v. *Cass*, 1 B. & Ad. 343.

(*p*) *Dickson* v. *Cass*, 1 B. & Ad. 343; and see *Craven* v. *Edmondson*, 6 Bing. 734; 4 Moo. & P. 622, S. C.

(*q*) *Ex parte Stone*, 1 G. & J. 191.

(*r*) *Fair* v. *M'Ivor*, 16 East, 130; *Lackington* v. *Combes*, 6 Bing. N. C. 71; 8 Scott, 312, S. C.

(*s*) *Forster* v. *Wilson*, 12 M. & W. 191.

(*t*) Ibid.

CHAPTER XXVII.

stantial justice between the parties, where a debt is really due from the bankrupt to the debtor to his estate" (*u*).

Attempt to deprive of set-off.

Nor can the assignees of the bankrupt deprive a man of a set-off, once existing (*x*).

MUTUAL CREDIT.

We have seen, that the general statutes of set-off only authorize a set-off of mutual *debts;* but the Bankrupt Acts have long authorized the set-off of mutual *credits,* as well as of a mutual debt. The recent act, 32 & 33 Vict. c. 71, s. 39, introduces a set-off, not only where there have been mutual debts and credits but mutual *dealings.*

It has been decided that the term mutual credit is more comprehensive than the expression *mutual debts.*

Mutual credit need not be of money.

In the first place, it has been held, that credit need not necessarily be of money. Therefore, where a trader, being indebted to a packer on a note of hand, sent him certain goods to pack, the trader having become bankrupt, Lord Hardwicke thought that the packer was entitled to set off against the price of the goods, not only the charge for packing, but the money due on the note (*y*). This decision, however, goes further than any other, and was qualified very soon after by the same learned person (*z*). The law is now taken to be, that, in order to set off goods, the property must have been deposited with an authority to turn it into money; in other words, the mutual credit must be such as was intended to terminate in a debt (*a*). Therefore it has been held, that where, in consideration of the bankrupt's acceptance, defendant promised to indorse a bill to the bankrupt, such promise was not a subject of mutual credit (*b*). And the mutual credit must have actually existed between the bankrupt himself and the other party (*c*).

The debts need not be due.

There may be mutual credit in bankruptcy, though one of the debts constituting it be not due; as if it be a bond, bill, or note payable at a future day (*d*).

(*u*) *Forster* v. *Wilson*, 12 M. & W. 191.

(*x*) *Edmeads* v. *Newman*, 1 B. & C. 418; *Bolland* v. *Nash*, 8 B. & C. 105.

(*y*) *Ex parte Deeze*, 1 Atk. 228.

(*z*) *Ex parte Ockenden*, 1 Atk. 235.

(*a*) *Glennie* v. *Edmunds*, 4 Taunt. 775; *Rose* v. *Hart*, 8 Taunt. 499; 2 Moo. 547, S. C.; *Easum* v. *Cato*, 5 B. & Al. 861; 1 Dowl. & R. 530; *Sampson* v. *Burton*, 2 B. & B. 89; *Russell* v. *Bell*, 8 M. & W. 277. A mere liability is insufficient. *Abbott* v. *Hicks*, 5 Bing. N. C. 578.

(*b*) *Rose* v. *Sims*, 1 B. & Ad. 521; but see *Gibson* v. *Bell*, 1 Bing. N.C. 743; 1 Scott, 712, S. C.

(*c*) *Young* v. *Bank of Bengal*, 1 Moore's P. C. C. 150. But as to this case, see *Naoroji* v. *Chartered Bank of India*, L. R., 3 C. P. 444.

(*d*) *Ex parte Prescott*, 1 Atk.

An acceptance of the bankrupt's may be set off as an ingredient in mutual credit, notwithstanding that it was not due at the time of the bankruptcy, and was in the hands of an indorsee (*e*).

And where a bill is indorsed, credit may be deemed to be given to the indorser as well as to the acceptor, and therefore if the indorser become bankrupt, the indorsement may be an ingredient in mutual credit (*f*). A bill accepted for the accommodation of the bankrupt is within the mutual credit clause (*g*), and may, *under that clause*, be set off against a demand by the assignees for money had and received to *their* use after the bankruptcy (*h*).

Mutual credit need not be intended.

It is not necessary, to constitute mutual credit, that the parties both intended there should be mutual credit; it is sufficient though one take, by indorsement from a third party, the note or acceptance of another without his knowledge (*i*).

Breach of trust.

But where goods or bills are deposited with a direction to turn them into money and apply the proceeds in a particular manner, if the party receiving the property is guilty of a breach of trust he cannot claim the benefit of a set-off under this section (*k*).

Mutual credit does not extinguish a lien.

But mutual credit will not destroy a lien created by express contract. C. held M.'s acceptance for 24*l*., and sent M. an article to be repaired by him. It was agreed that C. should pay M. the amount of the repairs in ready money. Before the repairs were completed M. became bankrupt. Held, that C. could not, by virtue of his cross-demand on the acceptance, sue M.'s assignees in trover for the article before paying the amount of the repairs (*l*).

230; *Atkinson* v. *Elliott*, 7 T. R. 378.

(*e*) *Collins* v. *Jones*, 10 B. & C. 777; *Bolland* v. *Nash*, 8 B. & C. 105; 2 Man. & R. 189, S. C.; *Russell* v. *Bell*, 8 M. & W. 277.

(*f*) *Alsager* v. *Currie*, 12 M. & W. 755; and see *Starey* v. *Barns*, 7 East, 435; see *Young* v. *Bank of Bengal*, 1 Moore's Privy Council Cases, 150.

(*g*) *Smith* v. *Hodson*, 4 T. R. 211; *Ex parte Bayle*, Cooke's Bkt. Law, 542; *Ex parte Wagstaff*, 13 Ves. 65; *Bittleston* v. *Timmis*, 14 L. J., C. P. 117; 1 C. B. 389, S. C.

(*h*) *Bittleston* v. *Timmis*, and see *Hulme* v. *Muggleston*, 3 M. & W. 30. The mistake in the marginal note of that case is corrected in *Bittleston* v. *Timmis*, ubi supra.

(*i*) *Hankey* v. *Smith*, 3 T. R. 507.

(*k*) *Key* v. *Flint*, 8 Taunt. 21; 1 Moo. 451, S. C.; *Ex parte Flint*, 1 Swanst. 30; *Buchanan* v. *Findlay*, 9 B. & C. 738; 4 M. & Ry. 593, S. C.

(*l*) *Clarke* v. *Foll*, 4 B. & Ad. 404; 1 Nev. & Man. 244, S. C.

CHAPTER XXVII.

Set-off in bankruptcy may be either in an action at law, or before the commissioners.

How taken advantage of.

A set-off under the Bankruptcy Act is available in all actions, whether for debt or damages. No plea or notice was formerly necessary, though it was usual to plead or give notice as under the general statutes. But now by Rule 8, T. T. 1853, re-enacting R. H., 4 Will. 4, mutual credit must be pleaded. Where the assignees affirm the bankrupt's dealings, they let in his set-off (*m*). An assignment under the old Insolvent Debtors' Act had no relation back to the commencement of the imprisonment, and therefore the assignees having declared on a sale by the insolvent, after the imprisonment, and before the assignment, not on a sale by themselves, were subject to the defendant's set-off against the insolvent (*n*).

To an action for a debt due to the assignees in their official character, the defendant cannot plead a set-off due from the bankrupt before his bankruptcy (*o*). But such a set-off may be the subject of mutual credit (*p*).

Mutual credit under the Companies Act.

But where, there being no bankruptcy, a company in process of winding up held acceptances of S., not yet due, but S. the acceptor held bills drawn and indorsed by the company, which bills, the drawees having refused acceptance, had therefore become a present debt due from the company to S.; it was held, on appeal, that the official liquidator of the company had a right to negotiate the acceptances of S., because there was no mutual credit, the case not being within the provisions of the Bankruptcy Act (*q*).

SET-OFF IN EQUITY.

Thirdly, Set-off in equity.

The jurisdiction of Courts of equity in set-off does not depend on the statute law; it existed before any act of Parliament on the subject; and has, since the statutes, been exercised in cases which they will not reach (*r*).

Thus, where A. S. directed her bankers to invest a sum of money in the public funds, which they led her to believe they had done, when in fact they had not, A. S. afterwards joining her brother, J. S., in a joint and several note to the

(*m*) *Smith* v. *Hodson*, 4 T. R. 211.

(*n*) *Sims* v. *Simpson*, 1 Bing. N. C. 306.

(*o*) *Groom* v. *Mealey*, 2 Bing. N. C. 138; 2 Scott, 171, S. C.; *Wood* v. *Smith*, 4 M. & W. 522.

(*p*) See *Bittleston* v. *Timmis*, supra.

(*q*) *In re Commercial Bank of India*, L. R., 1 Ch. App. 588. See *In re Agra and Masterman*, L. R., 8 Eq. 337.

(*r*) Story's Equity Jurisprudence, s. 1435.

bankers for money advanced by them to J. S., and the bankers failing, Lord Eldon directed the sum due to A. S. to be set off (*s*) against the demand in a suit by the assignees against J. S.

Equity will not relieve a party, who has neglected to plead a set-off at law (*t*). But if the set-off were a mere equitable demand, not available at law, equity would assist (*u*).

OF CASES WHERE A STIPULATION, NOT THE SUBJECT OF A SET-OFF, IS A BAR TO THE ACTION.

There are cases in which a stipulation between the parties, though not the subject of a set-off, is a bar to the set-off.

A release is, as we have seen, a discharge of the action, whether, at the date of the release, the bill were due or not. And a covenant not to sue at all is equivalent to a release. So, a release upon condition, or a general covenant not to sue upon condition, are each of them, after condition performed, a good defence. But a covenant not to sue for a certain time (*x*) is neither an absolute discharge of the action, for that was not the intention of the parties, nor a suspension of it; because it is a rule of law, that a personal action, once suspended by the act of the parties, is gone for ever.

In general, where an instrument is not the subject of a set-off, it can only bar the action by operating as a release. So that, if not under seal, it has no effect in barring the action, and no effect at all if made without consideration.

But, in favour of commerce, this rule has been relaxed in the case of bills. We have seen, that an express renunciation by the holder of his claim on the acceptor has been held a bar to an action by the holder against the acceptor. So, it has been decided, that an absolute or conditional simple agreement between parties to a bill, that a party liable shall not be sued, operates as a defeasance or release. And it has been decided, that an indemnity has the same effect (*y*).

(*s*) *Ex parte Stephens*, 11 Ves. 24; and see *Ex parte Hanson*, 12 Ves. 346.

(*t*) *Ex parte Ross*, Buck. 127.

(*u*) *Townrow* v. *Benson*, 3 Mad. 203. An equitable set-off may now be pleaded by way of equitable plea in an action at law. And see *Cochrane* v. *Green*, 9 C. B., N. S. 443; 30 L. J., C. P. 79, S. C.

(*x*) *Ayliff* v. *Scrimshire*, 1 Show. 46; ante, p. 236.

(*y*) *Carr* v. *Stephens*, 9 B. & C. 758; 4 Man. & R. 590, S. C.

CHAPTER XXVIII.

OF A LOST BILL OR NOTE.

Title of the Finder . . 370
Proper Course for the Loser to take 370
Notice of Loss . . . 371
Presentment and Notice of Dishonour of a Lost Bill 372
Bill in the hands of an adverse Party . . . 372
Whether an Action lies on a Destroyed Bill . . 372
Will not lie on a Lost Bill 373
Unless not negotiable . 374
Pleading 374
Loss after Action brought . 374
Loss of Half-Note . . 375
Trover for Lost Bill . . 375
Remedy for Loser in Equity 375
At Law 376
New Statutable Jurisdiction of Courts of Law . 377
On whom the Loss of a Bill transmitted by Post, &c. will fall . . . 377

CHAPTER XXVIII.

Title of the finder.

THOUGH the finder of a lost bill or note acquires no property in it, so as, on the one hand, to enable him to defend an action of trover brought by the rightful owner, or on the other, to sue the acceptor or maker, yet we have already seen that, if the finder transfer a lost bill or note, which may pass *by delivery only*, his transferee, provided he took it honestly, is entitled both to retain the instrument against the loser, and to compel payment from the parties liable thereon.

Proper course for the loser to take.

Let us now inquire what steps the loser should take. And, in the first place, it is settled that if bills or notes be lost or stolen out of letters put into the post office, no action lies against the Postmaster-General. "The case of the Postmaster," says Lord Mansfield, "is in no circumstance whatever similar to that of a common carrier; but he is like all other public officers, such as the Lords Commissioners of the Treasury, the Commissioners of the Customs and Excise, the Auditors of the Exchequer, &c.; who were never thought liable for any negligence or misconduct of the inferior officers, in their several departments" (*a*). But

(*a*) *Whitfield* v. *Lord Le Despencer*, Cowp. 754; *Lane* v. *Cotton*, 1 Salk. 17.

a deputy postmaster is liable for neglect in not duly delivering letters (*b*).

Notice of loss.

It is advisable that the loser should immediately give notice of the loss to the parties liable on the bill; for they will thereby be prevented from taking it up without due inquiry. Public advertisement of the loss should also be given; for, if any person whosoever discounts it with notice of the loss, that will be such strong evidence of fraud that he can acquire no property in it (*c*). But public notice is

(*b*) *Rowning* v. *Goodchild*, 3 Wils. 443; 2 W. Bl. 906; 5 Burr. 2716; *Hordern* v. *Dalton*, 1 C. & P. 181.

(*c*) A public notification of the loss is not only advisable to prevent the transfer of lost or stolen bills or notes into the hands of *bonâ fide* holders, but there are cases in which it was formerly considered essential to the plaintiff's right to recover of those who might have taken the instrument. See the observations of Best, C. J., in *Snow* v. *Peacock*, 3 Bing. 411; 11 Moo. 286, S. C. The law formerly was, that if a man took a lost bill or note negligently, he acquired no title against the rightful owner; but if the loser had neglected to publish his loss, and the receiver took the note, not dishonestly, but negligently, then the negligence of the loser equalled the negligence of the receiver, and *potior erat conditio possidentis*. *Snow* v. *Peacock*, 3 Bing. 411; 11 Moo. 284; *Strange* v. *Wigney*, 6 Bing. 677; 4 M. & P. 470, S. C. Thus, where the plaintiff was robbed of his pocket-book, containing an indorsed bill, and then advertised the pocket-book, saying nothing of the bill, but on the contrary, stating in the advertisement that the contents of the pocket-book were of no use to any but the owner; the Court of C. P. held that he was not entitled to recover against a negligent receiver; for that his notice, that the contents of the pocket-book were of no use to any but the owner, tended rather to mislead than to assist parties to whom the bill might be offered. *Beckwith* v. *Corral*, 3 Bing. 444. If due notice had been given of the loss, then, though the receiver took the instrument *bonâ fide* and without suspicion, yet if he failed to exercise proper care and caution, as if he discounted or changed a bill or note of considerable amount for a stranger, without inquiry, he must have refunded. *Gill* v. *Cubitt*, 3 B. & C. 466; 5 Dowl. & R. 324; *Strange* v. *Wigney*, 6 Bing. 677; 4 Moo. & P. 470, S. C. But the law on this subject is now entirely changed. See the Chapter on TRANSFER, and the observations of Lord Denman in *Bartrum* v. *Caddy*, 9 Ad. & E. 280; 1 Per. & Dav. 207, S. C. The plaintiff went to a public meeting in London with more than 500*l.* in his pocket, and, entertaining some apprehensions of the company in which he found himself, kept his hand on his pocket, but notwithstanding that precaution was robbed, and, among other property, lost a Bank of England note for 200*l.*, payable to bearer. He advertised his loss in the newspapers. Nearly two years after, this note was traced to the possession of the defendant, who received it, as he said, in payment of a debt on the Derby stakes, but could not recollect from whom. The plaintiff sued him in trover, and the Court held the negligence of the plaintiff not being connected with the defendant's conduct, could not be

CHAPTER XXVIII.

of itself neither on the one hand sufficient nor on the other indispensable. To operate at all it must be brought home to the party to be affected by it (*d*).

We have already seen that, if the bill be transferable only by indorsement, a forgery can convey no title, and a payment by the acceptor or other party to a man, claiming under the forged indorsement, will not exonerate him.

Presentment and notice of dishonour of a lost bill.

The party who has lost or destroyed a bill must, nevertheless, make application to the drawee for payment at the time it is due (*e*), and give notice of dishonour; for the bill might still have been paid with or without an indemnity, and the prior parties, by not having been advised of the dishonour, may have been prevented from pressing their respective remedies against parties liable to them (*f*).

Bill in the hands of an adverse party.

There are three cases in which a plaintiff cannot produce a bill: it may be in the defendant's hands; it may be destroyed; or it may be lost.

If it be in the defendant's hands, the plaintiff may give him notice to produce it; and if the defendant will not do so, the plaintiff may give secondary evidence of its contents (*g*).

Whether an action lies on a destroyed bill.

If it can be proved that the instrument, whether negotiable or not, has been destroyed, it was once held that secondary evidence of its contents was admissible, and that the rightful owner was entitled to recover. "If a bill be proved to be destroyed," says Lord Ellenborough, "I should feel no difficulty in receiving evidence of its contents, and directing the jury to find for the plaintiff. Even on a trial for forgery, the destruction of the instrument, charged by the indictment to be forged, is no bar to the proceedings. I remember a case before Mr. J. Buller, where the prisoner had destroyed a bank note he was accused of having forged, by swallowing it; and the learned judge who presided held, that he might have been convicted without the production

set up as an answer to his claim, and that the defendant had not exercised due caution in taking the note. *Easley* v. *Crockford*, 10 Bing. 243; 3 M. & Scott, 700, S. C.; see *Snow* v. *Sadler*, 3 Bing. 610; 11 Moo. 506, S. C. The caution required of a person discounting was held to increase with the amount. See ante, Chapter on TRANSFER.

(*d*) See Byles on Bills, 5th American ed. p. 538.

(*e*) It has been held in America that the loss of a bill is an excuse for a reasonable delay in demanding payment. Byles on Bills, 5th American ed. p. 539.

(*f*) *Thackray* v. *Blackett*, 3 Camp. 164.

(*g*) *Smith* v. *M'Clure*, 5 East, 477; 2 Smith, 433, S. C.

of the bank note; and this doctrine was approved of by the whole profession" (*h*). But this doctrine is now overruled as to negotiable instruments, and it is settled that the owner of a *destroyed* bill or note, if negotiable, cannot, *at law* (*i*), recover against the other parties (*j*), whether the bill be actually indorsed or not (*k*). Nor can he even sue on the consideration (*l*).

Will not lie on lost bill or note.

And it is also now clear that, if a bill, note, or check, negotiable either by indorsement or by delivery only (*m*), be *lost*, no action will lie at the suit of the loser against any one of the parties to the instrument, either on the bill or note itself, or on the consideration (*n*). "Upon the question," says Lord Tenterden, "whether an action can be brought on a lost bill, the opinions of the Judges, as they are to be found in the cases, have not been uniform, and cannot be reconciled to each other. Amid conflicting opinions, the proper course is to revert to the principle of these actions on bills of exchange. The custom of merchants is that the holder of a bill shall present the instrument, at its maturity, to the acceptor, demand payment of its amount, and, upon the receipt of the money, deliver up the bill. The acceptor, paying the bill, has a right to the possession of the instrument for his own security, and for his voucher and discharge *pro tanto*, in his account with the drawer. As far as regards his voucher and discharge towards the drawer, *it will be the same thing whether the instrument has been destroyed or mislaid.* With respect to his own security against a demand by another holder, there may be a difference. But how is he to be assured of the fact, either of the loss or destruction of the bill? Is he to rely upon the assertion of the holder, or to defend an action at the peril of costs? And, if the bill should afterwards appear and a suit be brought against him by another holder, a fact not absolutely improbable in the case of a lost bill, is he to seek for the witnesses to prove the loss, and to prove that the new plaintiff must have obtained it after it became due? We think the custom of merchants does not authorize us

(*h*) *Pierson* v. *Hutchinson*, 2 Camp. 211; 6 Esp. 126, S. C.

(*i*) *I.e.*, without the help of the recent statute, post, 377.

(*j*) *Hansard* v. *Robinson*, 7 B. & C. 90; 9 D. & R. 860, S. C. But see *Woodford* v. *Whiteley*, Moo. & M. 517, and *Wain* v. *Bailey*, 10 Ad. & E. 616; 2 Per. & Dav. 507, S. C.; see *Price* v. *Price*, 16 M. & W. 243; *Ramuz* v. *Crowe*, 1 Exch. 167.

(*k*) *Ramuz* v. *Crowe*, supra.

(*l*) *Crowe* v. *Clay*, in error, 9 Exch. 604.

(*m*) *Bevan* v. *Hill*, 2 Camp. 381.

(*n*) *Crowe* v. *Clay*, 9 Exch. 604.

CHAPTER XXVIII.

to say that this is the law." And the law is the same though the bill had never been indorsed (*o*), and whether the bill be due or not (*p*). Where a bill made or become payable to bearer is lost, the acceptor, or other party, is not liable, though the bill was lost after a promise to pay by the acceptor. "If," says Lord Tenterden, "upon an offer of payment, the holder should refuse to deliver up the bill, can it be doubted that the acceptor might retract his offer, and retain his money?" (*q*).

Unless not originally negotiable.

But if a bill or note, *not negotiable* (that is to say, an instrument payable to the payee only, and not to his order or to bearer), be lost, it is conceived (*r*) that an action will lie either on the bill or on the consideration (*s*).

Pleading.

The defence that the bill was lost before action brought must, in the superior Courts, be raised by plea, otherwise the plaintiffs may recover by producing the ordinary secondary evidence (*t*). And a judge has no power to order a stay of proceedings until an indemnity be given (*u*).

Loss after action brought.

If a bill be lost after action brought, and the defendant suffer judgment by default, the Court will, on a copy verified by affidavit, refer it to the Master to see what is due (*x*). But if, in such a case, the defendant resists the action, and puts the plaintiff to prove the bill, under the ordinary issues the loss is no excuse for the non-production of it (*y*).

(*o*) *Ramuz* v. *Crowe*, 1 Exch. 167.

(*p*) *Clay* v. *Crowe*, 9 Exch. 608.

(*q*) *Hansard* v. *Robinson*, 7 B. & C. 95; *Davis* v. *Dodd*, 4 Taunt. 602.

(*r*) In America the general rule seems to be that an action will lie on a destroyed bill though negotiable, and on a lost bill though negotiable if not indorsed. See the American authorities, Byles on Bills, 5th American ed. p. 540.

(*s*) *Wain* v. *Bailey*, 10 Ad. & E. 616; *Price* v. *Price*, 16 M. & W. 243; *Ramuz* v. *Crowe*, 1 Exch. 167; *Hansard* v. *Robinson*, 7 B. & C. 90; 9 D. & R. 860, S. C.; but see *Woodford* v. *Whiteley*, Moo. & M. 517; *Bevan* v. *Hill*, 2 Camp. 381; see, however, *Ramuz* v. *Crowe*, 1 Exch. 172; *Long* v. *Bailie*, 2 Camp. 214, n.; *Champion* v. *Terry*, 3 B. & B. 295; 7 Moo. 130, S. C.; *Rolt* v. *Watson*, 4 Bing. 273; 12 Moore, 510, S. C.

(*t*) *Blackie* v. *Pidding*, 6 C. B. 196; *Charnley* v. *Grundy*, 14 C. B. 608.

(*u*) *Aranguren* v. *Scholfield*, 1 H. & N. 464.

(*x*) *Brown* v. *Messiter*, 3 M. & Sel. 281; *Allen* v. *Miller*, 1 Dowl. 420; *Clarke* v. *Quince*, 3 Dowl. 26; *Flight* v. *Browne*, 2 Tyr. 312.

(*y*) *Poole* v. *Smith*, Holt, N. P. 144. See the American authorities, Byles on Bills, 5th American ed.

Loss of half-note.

It has been said, that where a man takes half a note, he takes it necessarily under suspicious circumstances (*z*), and cannot recover to the injury of the maker. Thus, where the holder sued on the half of a *5l.* note, the other half having been stolen from the Leeds mail, Lord Ellenborough said, "Payment can be enforced at law only by the production of an entire note, or by proof that the instrument, or the part of it which is wanting, has been actually destroyed. The half of this note taken from the Leeds mail may have immediately got into the hands of a *bonâ fide* holder for value; and he would have had as good a right of suit upon that as the plaintiff has upon this. But the maker of a promissory note cannot be liable, in respect of it, to two parties at the same time" (*a*). It is doubtful how far the argument, from the liability of the maker on the second half, would be held valid at this day. The holder of the first half has good title and no notice; the holder of the second half has a bad title and notice. But it may be a question whether a half note be for all purposes a negotiable instrument (*b*).

Trover for lost bill or note.

If a lost bill or note be in the hands of a party who has no right to retain it, as if, for example, it be still in the possession of the finder, or of a transferee, who has taken it from him under circumstances amounting to fraud, the true owner may bring an action of trover; or, if it had been paid by the acceptor or maker to such wrongful holder, the amount is recoverable in an action for money had and received (*c*). And we have seen that, if the maker or acceptor pay it improperly, the amount will not be allowed him in account with the payee or drawer (*d*).

Remedy for loser in equity.

But, where no action lies on the lost bill, or on the consideration, as, where the bill has been indorsed in blank, and where no action can be brought against a wrongful holder, either in trover or assumpsit, the loser was not absolutely without remedy even before the recent statute; he might then resort to a court of equity for relief.

(*z*) Bayley, 6th ed. 379.

(*a*) *Mayor* v. *Johnson*, 3 Camp. 324; *Mossop* v. *Eaden*, 16 Ves. 436.

(*b*) The Bank of England have always been in the habit of paying half-notes on an indemnity. And it has been held that the provisions of the Common Law Procedure Act, 1854, s. 87, apply to the case of half-notes. Per Willes, J., at Chambers, *Redmayne* v. *Burton*, 9 Jur. 21; *Smith* v. *Monday*, 6 Jur. 977.

(*c*) *Down* v. *Halling*, 4 B. & C. 330; 6 D. & Ry. 455; 2 C. & P. 11, S. C.; *Lovell* v. *Martin*, 4 Taunt. 799.

(*d*) As to the liability of a party wrongly paying, see ante, Chapter on PAYMENT.

CHAPTER XXVIII.

The 9 & 10 Will. 3, c. 17, s. 3, enacts, that "in case any *such* inland bill shall happen to be lost or miscarried within the time before limited for the payment of the same, then the drawer of the said bill is and shall be obliged to give another bill of the same tenor with that first given; the person to whom it is delivered giving security, if demanded, to the drawer, to indemnify him against all persons whatsoever in case the said bill, so alleged to be lost or miscarried, shall be found again" (*e*).

This provision is not peculiar to the law of England, but agreeable to the mercantile law of other countries (*f*).

Notwithstanding some authorities to the contrary (*g*), it is now clearly settled that a Court of common law has no jurisdiction under this statute; a Court of law it was said not being able to enforce the giving of a new bill, or qualified to judge of the sufficiency of an indemnity (*h*).

The relief, however, administered by Courts of equity is not confined within the letter of the statute. It will be afforded not only on *such* bills as are mentioned in the statute, but on others; not only before they are due, but after; not only on bills, but on notes; not only against the drawer, but against the indorser, or the acceptor; not only may a new bill be required, but payment (*i*). But the Court will not call on a party to renew or pay a lost bill, without providing him with a satisfactory indemnity (*k*). Neither will the court entertain a suit by an intended indorsee against the acceptor where there has been no actual indorsement by the payee, the bill never having become negotiable and being destroyed (*l*). To a suit in equity by the last indorsee of a lost bill against the acceptor, the prior indorsers need not be made parties (*m*).

(*e*) The 3 & 4 Anne, c. 9, extends, as it seems, this enactment to promissory notes.

(*f*) Code de Commerce, Liv. 1, tit. 9, art. 151, 152; Ordonnance de Commerce de Louis XIV., tit. 5, art. 19.

(*g*) *Walmesley* v. *Child*, 1 Ves. sen. 346; *Hart* v. *King*, 12 Mod. 309; Holt, 118, S. C.

(*h*) *Ex parte Greenway*, 6 Ves. 812; *Davies* v. *Dodd*, 4 Price, 176; *Toulmin* v. *Price*, 5 Ves. 238; *Bromley* v. *Holland*, 7 Ves. 19, 20, 249.

(*i*) *Walmesley* v. *Child*, 1 Ves. sen. 346; *Powell* v. *Monnier*, 1 Atk. 611; *Toulmin* v. *Price*, 5 Ves. 238; *Ex parte Greenway*, 6 Ves. 812; *Mossop* v. *Eaden*, 16 Ves. 430; *Hansard* v. *Robinson*, 7 B. & C. 90; 9 D. & R. 860, S. C.; *Davis* v. *Dodd*, 4 Taunt. 602.

(*k*) Such also is the rule of equity in America, Byles on Bills, 5th American ed. p. 545.

(*l*) *Edge* v. *Bumford*, 31 L. J., Ch. 805.

(*m*) *Macartney* v. *Graham*, 2 Sim. 285.

New statutable jurisdiction of Courts of law.

And now at law by the 17 & 18 Vict. c. 125, s. 87, in case of any action founded upon a bill of exchange, or other negotiable instrument, the Court or a Judge has power to order "that the loss of such instrument shall not be set up provided an indemnity is given, to the satisfaction of the Court or Judge, or a Master, against the claims of any other person upon such negotiable instrument (*n*).

On whom the loss of a bill transmitted by post, &c. will fall.

Where a debtor remits his creditor a bill or note, by a conveyance which the creditor directs, or by post, if that be the ordinary vehicle of transmission between them, and the bill or note be lost or stolen, the loss will fall on the party to whom the bill was intended to be remitted (*o*).

(*n*) Bank notes are within this act. *M'Donnell* v. *Murray*, 9 Ir. Com. Law Rep. 495. And half-notes; per Willes, J., at Chambers, *Redmayne* v. *Burton*.

(*o*) *Warwick* v. *Noakes*, Peake, 67.

CHAPTER XXIX.

HOW FAR A BILL OR NOTE IS CONSIDERED AS PAYMENT.

Suspends the Remedy on a Simple Contract . . 378
Bill given as Collateral Security . . . 379
Form of Pleading . . 379
But not on a Contract under Seal 380
Does not suspend Distress . 380
Payment of Attorney . 380
Consequence of a Creditor taking Bills of a Third Person 380
Of the Creditor's Agent taking the Debtor's Bill 381
What a Creditor who has been paid by a Dishonoured Bill must prove 382
Where the Transferer knew the Instrument to be of no Value . . 382
A Lost or Destroyed Bill, when Payment . . 382
Payment by Bank Notes or Bills or Notes payable to Bearer . . . 382
Where a Bill is renewed . 383
Taking a Bill determines a Lien 383
But not on Land . . 384
Is Earnest . . . 384

CHAPTER XXIX.

Suspends the remedy on a simple contract.

THOUGH it be a general rule of law, that one simple contract cannot be satisfied by another similar executory contract (*a*), for that is merely substituting one cause of action for another, yet the delivery of a valid bill or note suspends the creditor's remedy for a debt, and if he either receive the money on the instrument, or be guilty of *laches*, it operates as a complete satisfaction (*b*). "The law," says Lord Kenyon, "is clear, that if, in payment of a debt, the creditor is content to take a bill or note payable at a future day, he cannot legally commence an action on his original debt, until such bill or note becomes payable, and default is made in the payment; but, if a bill or note is of no value, as if, for example, drawn on a person who has no effects of the drawer in his hands, and who, therefore, refuses it, in such case he may consider it as waste paper, and resort to the

(*a*) But see Com. Dig. Accord, B.; *Good* v. *Cheesman*, 2 B. & Ad. 328; 4 C. & P. 513, S. C.; *Cartwright* v. *Cook*, 8 B. & Ad. 701; *Garrard* v. *Woolner*, 8 Bing. 258; 1 M. & Sc. 327, S. C.; *Carter* v. *Wormald*, 1 Exch. 81.

(*b*) 3 & 4 Anne, c. 9, s. 7; *Sibree* v. *Tripp*, 15 L. J., Exch. 318; 15 M. & W. 23, S. C.

original demand, and sue the debtor on it" (*c*). The taking a bill or note from the original debtor, or from a third person (*d*), amounts to an agreement to give the debtor credit for the time it has to run, but when that time has expired, and the bill or note is in the hands of the creditor unpaid, the liability of the debtor on the original debt revives (*e*).

Collateral security.

But a creditor may agree to take for a debt already due a bill as a collateral security, without affecting his present right to sue for that debt. A creditor who takes from his debtor as collateral security only a bill indorsed by his debtor, as he is trustee of the rights so he is bound by the duties of a holder, and if he neglects to present or give notice of dishonour to his debtor, the debtor is discharged, for no one but the actual holder can perform these duties (*f*).

Form of pleading.

It is not essential to plead the taking of a negotiable instrument, either as payment, or as satisfaction. In answer to an action for a debt, it is sufficient to allege that a bill or note, payable to order or bearer, was delivered for and on account of the sum due (*g*), and that the bill or note has been or is running, or that it is in the hands of a third person (*h*). But a plea is not double, which alleges both that the bill was taken for and on account, and also in payment (*i*). But the liberty of pleading that a bill or note was given or taken *on account* is confined to the case of such instruments. It must appear on the face of the plea that the bill or note was payable to order or to bearer, otherwise the plea is bad, even after verdict (*k*).

The payment of a substituted note, though given by a

(*c*) *Stedman* v. *Gooch*, 1 Esp. 3; *Kearslake* v. *Morgan*, 5 T. R. 513. An unsatisfied judgment on the bill *alone* will not destroy the original debt. *Tarleton* v. *Allhusen*, 2 Ad. & Ell. 32.

(*d*) *Belshaw* v. *Bush*, 11 C. B. 131; *Bottomley* v. *Nuttall*, 28 L. J., C. P. 110; 5 C. B., N. S. 122, S. C.

(*e*) The law on this subject in the United States is not uniform, and subject to many distinctions. Byles on Bills, 5th American ed. p. 547.

(*f*) *Peacock* v. *Pursell*, 32 L. J. 256.

(*g*) *Kearslake* v. *Morgan*, 5 T. R. 513; see *Griffiths* v. *Owen*, 13 M. & W. 58.

(*h*) *Price* v. *Price*, 16 M. & W. 232; but see *Mercer* v. *Cheese*, 12 L. J., C. P. 56; 4 M. & G. 804; S. C.; *Crisp* v. *Griffiths*, 2 C., M. & R. 159.

(*i*) *Maillard* v. *Duke of Argyle*, 6 M. & G. 40. And an allegation that a bill was given "on account of and in *payment and discharge*," is not equivalent to an allegation that it was given in satisfaction. *M'Dowall* v. *Boyd*, 17 L. J., Q. B. 295; *Kemp* v. *Watt*, 15 M. & W. 672.

(*k*) *James* v. *Williams*, 13 M. & W. 828.

CHAPTER XXIX.

stranger, has been held, in an action on the first note, admissible under a plea of payment (*l*).

Not on a contract under seal.

The taking a bill or note from a party bound by a contract under seal does not extinguish or suspend the remedy on the specialty, unless the bill or note is actually paid. Thus, where one of three joint covenantors gave a bill of exchange for part of a debt secured by the covenant, it was held that the bill only operated as a collateral security, not affecting the remedy on the covenant, and even though judgment had been obtained on the bill; Le Blanc, J., observing, "The giving of another security, which, in itself, would operate as an extinguishment of the original one, cannot operate as such by being pursued to judgment, unless it produce the fruit of a judgment" (*m*).

Does not suspend distress.

Where a tenant gave a note of hand for arrears of rent, it was held that the landlord might nevertheless distrain, for the note was no alteration of the debt till after payment (*n*).

Note in payment of an attorney's bill.

The Attorneys' and Solicitors' Act, 6 & 7 Vict. c. 73, s. 21, enacts, that an application to tax an attorney's or solicitor's bill must be made within twelve months after payment. Where a promissory note is given for an attorney's bill, payable at a future day, the twelve months run from the time the note was paid, and not from the time it was given, unless it were treated as payment at that time (*o*).

Consequence of a creditor taking bills of a third person.

If the debtor, instead of paying the creditor, directs him to take a bill of a third person, which the creditor does, and the bill is dishonoured, the liability of the original debtor revives (*p*); and it is not necessary to give the original

(*l*) *Thorne* v. *Smith*, 20 L. J., C. P. 71; C. B. 659.

(*m*) *Drake* v. *Mitchell*, 3 East, 251; and see *Curtis* v. *Rush*, 2 Ves. & B. 416.

(*n*) *Harris* v. *Shipway*, 1744; *Ewer* v. *Lady Clifton*, C. B., Trin. T. 1735; Bull. N. P. 182; *Palfrey* v. *Baker*, 3 Price, 572; *Davis* v. *Gyde*, 2 Ad. & Ell. 623; 4 N. & M. 462, S. C. Even a bond given for rent does not extinguish it. Rent, though due on a parol lease, is of as high a nature as an obligation. 11 Vin. Ab. 289.

(*o*) *Sayer* v. *Wagstaff*, 5 Beav. 415; *In re Harries*, 13 M. & W. 8; *In re Wilton*, Q. B.

(*p*) *Marsh* v. *Pedder*, 4 Camp. 257; Holt, N. P. C. 72, S. C.; *Ex parte Dickson*, cited 6 T. R. 142; *Taylor* v. *Briggs*, M. & M. 28; and see *Robinson* v. *Read*, 9 B. & C. 449; 4 Man. & Ry. 349, S. C.

debtor notice of the dishonour (*q*). The bill or note must be presented within a reasonable time (*r*).

So if the creditor *not having the option of taking cash*, takes of his own accord a bill of his debtor's agent, the debtor is not discharged (*s*). But if the debtor refer his creditor to a third person for payment generally, and the creditor, having the option of taking cash, elects to take a bill which is dishonoured, the original debtor is discharged (*t*).

Of the creditor's agent taking the debtor's bill.

The consequence of giving a bill to an agent, an auctioneer, for example, who has no authority to receive anything but cash, is, that the party giving the bill is not discharged from the demand of the principal, although the bill fall due at the period when the debt ought to have been discharged, and be regularly paid to the holder (*u*).

The taking of his separate bill from one of several partners for a joint debt, will, as we have seen, discharge the others. Such a transaction imports an agreement between the creditor and the firm, that the creditor shall rest on the liability of the one partner alone, and shall discharge the others; that is, an accord—and the separate bill is a satisfaction. For the separate liability of one partner may, in many cases, be more advantageous than his joint liability with others. It is not extinguished, at law, by his predecease; in the event of a separate adjudication of bankruptcy against him, it would be satisfied before joint debts (*x*). and it avoids difficulties which might arise in suing him with another defendant (*y*).

Where the creditor's rights against an original debtor are reserved, whether by express agreement (*z*), or by the nature of the transaction, or by the original debtor's name being on the new bill, the taking of the bill of one of several, or of a stranger, does not discharge the original debtor.

(*q*) *Swinyard* v. *Bowes*, 5 M. & S. 62.

(*r*) *Chamberlyn* v. *Delarive*, 2 Wilson, 354.

(*s*) *Robinson* v. *Read*, 9 B. & C. 444; *Marsh* v. *Pedder*, Holt, N. P. C. 72; 4 Camp. 257, S. C.

(*t*) *Strong* v. *Hart*, 6 B. & C. 160; 9 D. & R. 189; 2 C. & P. 55, S. C.; *Smith* v. *Ferrand*, 7 B. & C. 19; 9 D. & R. 803, S. C.; and see *Baillie* v. *Moore*, 15 L. J., Q. B. 169; 8 Q. B. 489, S. C.

(*u*) *Sykes* v. *Giles*, 5 M. & W. 645; *Williams* v. *Evans*, 1 Law Rep., Q. B. 352; *Catterall* v. *Hindle*, 1 Law Rep., C. P. 186.

(*x*) 6 Geo. 4, c. 16, s. 62; 12 & 13 Vict. c. 106, s. 140.

(*y*) *Evans* v. *Drummond*, 4 Esp. 82; *Reed* v. *White*, 5 Esp. 122; *Thompson* v. *Percival*, 5 B. & Ad. 925; 3 N. & M. 667, S. C.

(*z*) *Bedford* v. *Deakin*, 2 Stark. 178; 2 B. & Ald. 210, S. C.

CHAPTER XXIX.

What a creditor who has been paid by a dishonoured bill must prove.

Where a debtor *indorses* a bill to his creditor, the creditor cannot sue for his debt without proving presentment of the bill and notice of dishonour (*a*). But where he *does not indorse it*, it seems sufficient for the creditor, when suing for the original debt, to show that the bill still remains in his hands, without proving presentment (*b*) or notice of dishonour (*c*); for that is presumptive evidence of dishonour, sufficient to throw it on the defendant to show that the bill has been paid.

Where the transferer knew the instrument to be of no value.

If the party who gave the bill in payment as a good bill knew at the time that it was of no value, or fraudulently misrepresented the solvency of parties to it (*d*), the holder, on discovering the fraud, may immediately sue such party on his original liability; or, if the bill were given for goods, delivered at the time, he may disaffirm the contract, and sue in trover for the goods. Thus where a vendee, under terms to pay for goods on delivery, obtained possession of them by giving a check, which was afterwards dishonoured, Lord Tenterden said, "If the vendee had reasonable ground to expect that the check would be paid, the transaction was not fraudulent, and the property would pass to him: if he had not reasonable ground for so expecting, the transaction was fraudulent, and the vendors are entitled to recover their property in an action of trover" (*e*).

A lost or destroyed bill, when payment.

A negotiable bill or note given in discharge of a debt, and then lost or destroyed, is at common law payment (*f*); but the recent statute 17 & 18 Vict. c. 125, s. 87, may, as we have seen, enable the owner to recover.

Payment by bank notes or bills or notes, payable to bearer.

We have already seen (*g*) that it has been held that, where a bill or note payable to bearer is delivered without

(*a*) *Kearslake* v. *Morgan*, 5 T. R. 513; *Bridges* v. *Berry*, 3 Taunt. 130.

(*b*) *Goodwin* v. *Coates*, 1 M. & Rob. 221.

(*c*) *Bishop* v. *Rowe*, 3 M. & Sel. 362.

(*d*) Byles on Bills, 5th American ed. p. 552.

(*e*) *Hawse* v. *Crowe*, 1 R. & M. 414; *Puckford* v. *Maxwell*, 6 T. R. 52; *Owenson* v. *Morse*, 7 T. R. 64; *Bishop* v. *Shillito*, 2 B. & Ald. 329, n.; *Taylor* v. *Plumer*, 3 M. & Sel. 562; *Brown* v. *Kewley*, 2 B. & P. 518; *Gladstone* v. *Hadwen*, 1 M. & Sel. 517; *Noble* v. *Adams*, 7 Taunt. 59; *Earl of Bristol* v. *Wilsmore*, 1 B. & C. 514; 2 D. & R. 755, S. C.; *Kilby* v. *Wilson*, 1 R. & M. 178. See the American authorities to the same effect, Byles on Bills, 5th American ed. p. 552.

(*f*) *Woodford* v. *Whiteley*, M. & M. 517; *Crowe* v. *Clay*, 9 Exch. 604. N.B.—In this Chapter the word PAYMENT is not always used in its strict legal sense.

(*g*) Chapter on TRANSFER.

indorsement, not in payment of a pre-existing debt, but in payment or exchange for goods or other securities sold at the time, such a transaction amounts in general to a sale of such a bill or note, and to an election by the transferee to take it as money with all its risks, and, consequently, to complete payment by the transferer (*h*).

Where a bill is renewed.

If, in payment of dishonoured bills, other bills be given for the sum due, and the first bills remain in the hands of the holder, if the latter bills be not paid, the liability of parties on the first bills revives (*i*). And even if the new bills be duly paid, the holder may recover on the old bills, if the amount of principal and interest due thereon be not covered by the amount of the new bills (*k*). The holder of an old bill for the full amount of which a new bill is given cannot sue on it till the new one is at maturity (*l*).

Taking a bill determines a lien.

The taking of a bill or note in payment will, in general, determine a lien. Thus, where the owner of a ship having a lien on the goods, until the delivery of good and approved bills, took a bill of exchange in payment, and though he objected to it at the time, afterwards negotiated it, it was held that such a negotiation amounted to an approval of the bill by him, and to a relinquishment of his lien on the goods (*m*). So where, for goods sold, the vendor took the vendee's promissory note, and negotiated it with his banker, and it was subsequently dishonoured, but continued outstanding in the banker's hands, it was held that the vendor had, by taking the note and negotiating it, relinquished his lien, and that the lien did not revive on the dishonour of the note, the note continuing in the banker's hands (*n*).

But if a bill or note is taken, and, remaining in the vendor's hands, is dishonoured, the goods not being delivered, it should seem that the lien revives (*o*).

(*h*) *Camidge* v. *Allenby*, 6 B. & C. 373; 9 D. & R. 391, S. C.; *Ward* v. *Evans*, 2 Ld. Raym. 928; *Brown* v. *Kewley*, 2 B. & P. 418; *Guardians of Lichfield Union* v. *Greene*, 26 L. J., Exch. 140; 1 H. & N. 884, S. C.; *Smith* v. *Mercer*, L. R., 3 Ex. 51. See the Chapter on TRANSFER.

(*i*) *Ex parte Barclay*, 7 Ves. 597; *Bishop* v. *Rowe*, 3 M. & S. 362; *Dillon* v. *Rimmer*, 1 Bing. 100; 7 Moo. 427, S. C.

(*k*) *Lumley* v. *Musgrave*, 4 Bing. N. C. 9; 5 Scott, 230, S. C.

(*l*) *Kendrick* v. *Lomax*, 2 C. & J. 405; 2 Tyr. 438, S. C.

(*m*) *Horncastle* v. *Farran*, 3 B. & Ald. 497; 2 Stark. 590, S. C.; *Alsager* v. *St. Katherine's Dock Company*, 14 M. & W. 784; *Tamvaco* v. *Simpson*, 19 C. B., N. S. 478.

(*n*) *Bunney* v. *Poyntz*, 4 B. & Ad. 568; 1 N. & M. 229, S. C.

(*o*) *New* v. *Swain*, 1 Dans. & L. 193; *Valpy* v. *Oakley*, 16 Q. B. 941.

CHAPTER XXIX.

But not on real property.

On the sale of real property the taking and negotiating a note or bill by the vendor does not amount to a relinquishment of his lien (*p*) on the land (*q*) for the unpaid purchase-money.

Is earnest.

A bill, check or promissory note is earnest, or part payment, within the seventeenth section of the Statute of Frauds, so as to obviate the necessity of a written contract (*r*).

A covenant to pay in promissory notes implies and includes a covenant to pay the notes when due (*s*).

An unstamped bill or check is not payment (*t*).

(*p*) *Ex parte Loring*, 1 Rose, 19; *Grant* v. *Mills*, 2 V. & B. 306. See *Macreth* v. *Simmons*, 15 Ves. 329. See as to the effect of taking a void check, *Bond* v. *Warden*, 14 L. J., Chan. 154; 1 Coll. 583, S. C.

(*q*) As to the circumstances under which the transfer of a bill is payment in bankruptcy, see the Chapter on BANKRUPTCY.

(*r*) Chitty on Bills, 8th ed. 80, note (*b*), p. 84.

(*s*) *Dixon* v. *Holroyd*, 27 L. J., Q. B. 43; 7 E. & B. 903, S. C.

(*t*) *Cundy* v. *Marriott*, 1 B. & Ad. 696; *Bond* v. *Warden*, 14 L. J., Ch. 154; 1 Coll. 583, S. C.

CHAPTER XXX.

OF SETS, PARTS AND COPIES OF BILLS.

What a Bill drawn in parts is 385
The whole set but one Bill . 386
To whom the Bill belongs when the parts are in different hands 386
How many parts required . 386
Effect of omitting to refer to the other parts . . 386
Liability of Drawee . . 387
Liability of Indorser . 387
Copies of Bills 387
Substitutions 388

CHAPTER XXX.

What a bill drawn in parts is.

FOREIGN bills (*a*) are often drawn in parts, all the parts together making what is called a set.

Exemplars or parts of the bill are made on separate pieces of paper, each part being numbered, and referring to the other parts. Each part contains a condition that it shall continue payable only so long as the others remain unpaid. These parts should circulate together; or one may be forwarded for acceptance while the other is delivered to the indorsee, thus relieving him from the necessity of forwarding his part for acceptance, but giving him the indorser's security immediately, and diminishing the chances of losing the bill (*b*). Every transferer is bound to hand over to his

(*a*) Il existe dans la négotiation des lettres de change un usage qui la facilite et assure leur paiement rapide; c'est la faculté de tirer par première, seconde, et troisième, &c. &c., c'est à dire de souscrire plusieurs exemplaires.

Cet usage remonte à des temps déjà reculés; il était en vigueur sous l'ancienne législation, et Cleirac en cite des exemples qui se rapportent au milieu du seizième siècle.

Il n'est pas sans intérêt de reproduire ses observations fort sensées:

"Et d'autant que les lettres de change sont des papiers volans, des petits poulets, ou billets, *Polizza di Cambio*, qui se peuvent facilement esdirer et perdre. Comme aussi le banquier correspondant à Paris peut manquer au paiement, c'est pourquoi, tant le bourgeois qui a tiré, que son commissionnaire residant à Paris, ont chacun besoin d'une copie pour faire leurs diligences. A cette cause le banquier doit écrire, et fournir par précaution deux ou trois copies de la même lettre de semblable teneur." Nouguier des Lettres de Change, 1, 104.

(*b*) The facility which drawing a bill in sets affords for its presentment, has been held to accelerate the time within which a bill, payable after sight, ought to be presented for acceptance. *Straker* v. *Graham*, 4 M. & W. 721.

CHAPTER XXX.

transferee all the parts of the bill in his possession, and he may even be liable to hand them over to a subsequent transferee, if he have them still in his possession (*c*).

The whole set but one bill.

The whole set, of how many parts soever it be composed, constitutes but one bill, and the regular payment and cancellation of any one of the parts extinguishes all (*d*).

A firm, who were both payees and acceptors of a foreign bill in three parts, indorsed one part to a creditor to remain in his hands till some other security were given for it, and then indorsed another part of the same bill for value to a third person. They afterwards gave the first indorsee the proposed security, and took back the first part of the bill from him. Held, that the holder of the second part was not precluded from recovering against the firm: first, because the substitution of the security for the first part was not a payment; and, secondly, because the firm were, as between themselves and the second indorsee, estopped from disputing the regularity of their acceptance and indorsement of the second part (*e*).

To whom the bill belongs when the parts are in different hands.

But as between *bonâ fide* holders for value of different parts of the same bill, he who first obtains a title to his part is entitled to the other parts (*f*), and may, it has been said, maintain trover for them, even against a subsequent *bonâ fide* holder (*g*).

How many parts may be required.

If a man be under an obligation to deliver a foreign bill, it seems he is bound to deliver as many parts as may be applied for (*h*).

Effect of omitting to refer to the other parts.

An omission on one part to express the reference to the others, and the condition relating to them, may have the effect of obliging the drawer to pay more than one part (*i*).

(*c*) *Pinard* v. *Klockman*, 32 L. J., Q. B. 82; 3 Best & Smith, 388, S. C.

(*d*) Byles on Bills, 5th American edition, 555. A contract to deliver up a bill drawn in parts, is a contract to deliver up every part. *Kearney* v. *West Granada Mining Company*, 1 H. & N. 412.

(*e*) *Holdsworth* v. *Hunter*, 10 B. & C. 449.

(*f*) Ibid.; *Perreira* v. *Jopp*, 10 B. & C. 450, n.

(*g*) For it is the duty of a person taking one of several parts to inquire after the others; *Lang* v. *Smyth*, 7 Bing. 284, 294; 5 M. & P. 78, S. C.; and he is advertised by the part which he does take, that he takes it without the others at his peril.

(*h*) 1 Pard. 334. But since each part is now subject to a stamp, it may be doubtful whether he is so bound, unless the party applying will furnish the extra stamps.

(*i*) *Davison* v. *Robertson*, 3

Liability of drawee.

The drawee should accept only one part. For if two accepted parts should come into the hands of different holders, and the acceptor should pay one, it is possible that he may be obliged to pay the other part also (*j*).

And he should not pay without taking back the part which he has accepted (*k*), for, having paid the unaccepted part, he may be obliged afterwards to pay the accepted part also.

Liability of indorser.

And if an indorser improperly circulate two parts to distinct holders, he may be liable on each (*l*). The forgery of the payee's indorsement on one of the parts will of course pass no interest even to a *bonâ fide* holder (*m*).

It is conceived, that an indorser is not bound to pay any one part, unless every part bearing his indorsement be delivered up to him (*n*).

Copies of bills.

Copies of bills are not, it is believed, much used in this country. A protest may be made on the copy of a bill in some cases (*o*). But, abroad, when a bill is not drawn in sets, it is sometimes the practice to negotiate a copy, while the original is forwarded to a distance for acceptance.

In such a case, the person who circulates the copy should transcribe the body of the bill, and all the indorsements, including his own, literally, and, after all, he should write "Copy :—the original being with such a person." If he should omit to state that the bill is a copy, or to write his own indorsement *after* the word *copy*, he may become liable on the copy as on an original (*p*).

Dow. 218, 228; Beawes, 480; Poth. 111; 2 Pard. 367. But not an inaccurate reference or an omission to name one part obviously by mistake. Bayley, 6th ed. 30.

(*j*) See *Holdsworth* v. *Hunter*, 10 B. & C. 449.

(*k*) Celui qui paie une lettre de change sur une deuxième, troisième, quatrième, &c., sans retirer celle sur laquelle se trouve son acceptation, n'opère point sa libération à l'égard du tiers porteur de son acceptation. Code de Commerce, Art. 148.

(*l*) See *Holdsworth* v. *Hunter*, supra.

(*m*) *Cheap* v. *Harley*, 3 T. R. 127; see *Smith* v. *Mercer*, 6 Taunt. 80; 1 Marsh. 458, S. C.; *Fuller* v. *Smith*, 1 C. & P. 197; Ry. & M. 49, S. C.

(*n*) Lorsqu'une deuxième porte qu'elle ne sera payée qu'autant que la première ne l'aura pas été; l'endosseur qui endosse les deux exemplaires n'est point responsable envers le porteur de la seconde qui a reçu ce titre, tandis que la première était également en circulation.

Dans ce cas le porteur de la seconde est averti par les énonciations qu'elle contient. Pour se mettre à l'abri des fraudes de son cédant, il doit se faire remettre la première. Cour de Cassation, 4 Avril, 1832; Sirey, t. 32, 1. 29.

(*o*) *Dehers* v. *Harriot*, 1 Show. 163.

(*p*) L'usage des copies, quoiqu'il

CHAPTER XXX.

Substitutions.

It is a common but not a safe practice for a drawer, to whom a negotiated part has come back with many indorsements on it, to substitute a new part without such indorsements. The holder of such a substituted part may be deprived of his remedy against the acceptor by the intermediate act of the drawer (*q*).

ne soit pas consacré par la loi, n'en est pas moins valable. L'endosseur qui crée une copie, après avoir négocié l'original, est tenu de mentionner dans la copie l'endossement qu'il a écrit sur le titre même. Si, au contraire, après ces mots *pour copie*, il appose un endos, il fait supposer que l'original n'est pas endossé, et il est responsable vis-à-vis du porteur de bonne foi de la copie. Cour Royale de Paris, 14 Janvier, 1830; Sirey, t. 30, 1. 172.

(*q*) *Ralli* v. *Dennistoun*, 6 Exch. 483.

CHAPTER XXXI.

OF FOREIGN BILLS AND NOTES.

What are Foreign and what Inland Bills . . . 389
Statute 19 & 20 *Vict.* . 390
Presumption of being an Inland Bill . . . 300
Stamp on an Inland Bill purporting to be a Foreign one . . . 390
Sets of Bills . . . 390
Presentment of Foreign Bills 390
Acceptance of Foreign Bills 390
PROTEST 390

What are foreign and what inland bills.

BILLS of exchange are either foreign or inland (*a*). Inland bills of exchange, at common law, are such as are both drawn and payable within the limits of England, Wales and Berwick-on-Tweed (*b*).

Foreign bills, as distinguished from inland bills at common law, are such as are drawn or payable, or both, abroad, or drawn in one realm of the United Kingdom, and payable in another (*c*).

Bills drawn in England and payable in Scotland, or Ireland, or *vice versâ*, were until recently foreign bills, for they were so before the union between the countries, and the union does not make them inland bills (*d*). But bills drawn and payable in Scotland, or drawn and payable in Ireland, were inland bills within 1 & 2 Geo. 4, c. 78, to which an acceptance in writing was necessary (*e*).

Statute 19 & 20 Vict.

But now, by the 19 & 20 Vict. c. 97, s. 7, bills or notes

(*a*) Holt, C. J.: "I remember when actions upon inland bills of exchange did first begin, and there they laid a particular custom between London and Bristol, and it was an action against the acceptor. The defendant's counsel would put them to prove the custom, at which, Hale, who tried it, laughed, and said, they had a hopeful case on't." *Buller* v. *Crips*, 6 Mod. 29; 1 Salk. 130; Holt, 119, S. C.

(*b*) A bill drawn in England on a person residing abroad, but drawn and accepted *payable in England*, has been held an inland bill within the Stamp Act. *Amner* v. *Clarke*, 2 C., M. & R. 468.

(*c*) As to the Isle of Man and the Channel Islands, see Com. Dig. Navigation, 2, 3 and 4. *Godfrey* v. *Coulman*, 13 Moo. P. C. C. 11.

(*d*) *Mahoney* v. *Ashlin*, 2 B. & Ad. 478.

(*e*) Ibid.

CHAPTER XXXI.

drawn in one part and payable in any other part of the British Islands (*f*) are inland bills (*g*).

Presumption of being an inland bill.

A bill of exchange is *primâ facie* an inland bill. When an action is brought on a foreign bill, against a drawer or indorser, the declaration ought to disclose that it is a foreign bill. And if it do not, the defendant will be entitled to succeed on the ordinary traverses of the material allegations in the declaration (*h*).

Stamp on an inland bill purporting to be a foreign one.

Formerly the acceptor of a bill, purporting to be a foreign bill, but really made in England, and known by the acceptor at the time of acceptance to be so, was not precluded from objecting, in an action by an innocent indorsee, that it was really an inland bill and therefore void for want of a stamp (*i*). But there was an implied warranty by a transferer that a bill apparently drawn abroad really was so drawn (*k*). Now, however, every bill of exchange which shall *purport* to be drawn at any place out of the United Kingdom, shall for all the purposes of the Stamp Act be deemed a foreign bill, 17 & 18 Vict. c. 83, s. 4 (*l*), and may, as we have seen, be stamped accordingly. And by the 27 & 28 Vict. c. 56, s. 2, every bill of exchange payable on demand, and purporting to be indorsed abroad, shall, for the purposes of the Stamp Act, be deemed to be a foreign bill.

Sets of bills.

Foreign bills are frequently drawn in sets: that is, exemplars or parts of the bill are made on separate pieces of paper, each part referring to the other parts, and containing a condition that it shall continue payable only so long as the others remain unpaid.

For the law on this subject the reader is referred to the preceding Chapter on SETS, PARTS AND COPIES OF BILLS.

Presentment of foreign bills.

As to the presentment of foreign bills for acceptance or payment, see the Chapters on PRESENTMENT FOR ACCEPTANCE, and PRESENTMENT FOR PAYMENT.

Acceptance.

For the English law regulating the acceptance of foreign bills in this country, see the Chapter on ACCEPTANCE.

PROTEST.

As to the protest of foreign bills, see the Chapter on PROTEST.

(*f*) *i. e.* Great Britain, Ireland, Man, Guernsey, Jersey, Alderney, Sark, and the islands adjacent to any of them, s. 7.

(*g*) Except so far as stamp duty is concerned. See *Griffin* v. *Weathersby*, L. R., 3 Q. B. 753. And see APPENDIX.

(*h*) *Armani* v. *Castrique*, 13 M. & W. 443.

(*i*) *Steadman* v. *Duhamel*, 1 C. B. 888.

(*k*) *Gompertz* v. *Bartlett*, 2 E. & B. 854.

(*l*) See *Siordet* v. *Kuczynski*, 17 C. B. 251.

CHAPTER XXXII.

OF THE EFFECT OF FOREIGN LAW RELATING TO BILLS OF EXCHANGE AND PROMISSORY NOTES.

OF THE CONFLICT OF THE LAWS OF DIFFERENT COUNTRIES RELATING TO BILLS . . . 391
General Principles of the English Law . . 392
Five Principal Rules . 393
CASES WHERE THE LEX LOCI CONTRACTUS GOVERNS 394
Foreign Acceptance . . 394
Foreign Indorsement of Foreign Note . . 394
Foreign Discharge . . 394
CASES IN WHICH LEX LOCI SOLUTIONIS GOVERNS . 395
Foreign Indorsement of English Note . . 395
Time of Payment . . 395
Protest and Notice of Dishonour 395
Acceptance . . . 396
Rate of Interest . . 396
IMMORAL, ILLEGAL, AND INJURIOUS CONTRACTS. 396
REVENUE LAWS OF OTHER COUNTRIES DISREGARDED . . . 397
Stamps on Foreign Bills . 397
On Irish or Colonial Bills 397
Raising Objection to Stamp 398
What is such a Making within the Kingdom as to subject to a Stamp . 398
Presumption that Bill was drawn Abroad . . 398
APPLICATION OF THE LEX FORI TO FOREIGN BILLS 399
Statutes of Limitation . 399
Set-off 400
Power of Arrest . . 400
Statute of Frauds . . 400
Protest and Notice of Dishonour 400
Pleading 400
Burthen of Proof . . 400

CHAPTER XXXII.

OF THE CONFLICT OF THE LAWS OF DIFFERENT COUNTRIES RELATING TO BILLS.

SOMETIMES bills drawn in England are payable in a foreign country, and bills drawn in a foreign country are payable in England. Sometimes English bills circulate abroad, and foreign bills circulate here; and, frequently suits on foreign bills, or bills negotiated abroad, are brought in English Courts of justice. The laws of foreign countries, as to bills of exchange, often differ widely from the law of England, and from each other. But natural justice, mutual convenience, and the practice of all civilized nations, require that contracts, wherever enforced, should be regulated and interpreted according to the laws with reference to which they were made, otherwise the rights and liabilities of parties would entirely depend on the law of the country where the

CHAPTER XXXII.

remedy might happen to be sought. Such a state of things would introduce uncertainty and confusion infinitely greater than arises from that measure of respect and comity, which every tribunal now shows to the law of foreign nations.

Elements in the question.

In determining how far foreign laws are to regulate foreign contracts in English Courts, a great variety of circumstances are often necessary to be considered. It may be essential to regard the domicil of one, or both, or all, of the contracting parties, the place where the contract is made (which place it may not always be easy to determine, for the parties may live in different countries), the place where the contract is to be performed, the place where the subject-matter of the contract is locally situate, and the place where the remedy is sought.

Many nice questions, therefore, have already arisen, and many more will, no doubt, in future arise in our Courts, from the conflict of English with foreign law, as to bills of exchange.

Discrepancy on the doctrine of foreign writers.

The decisions of English Courts of justice on the international law of contracts have not been very numerous, but nothing can exceed the discrepancy and irreconcilable contrariety of the doctrines and opinions of foreign writers, not only on the application of the principles of international law to foreign contracts, but on the very principles themselves (*a*). To enter into the discussion of such topics would be foreign to the object and exceed the limits of this little book.

General principles laid down in England.

But in the dearth of authoritative decisions, on the degree to which foreign law is admissible here to govern the contracts arising on bills or notes made, negotiated, or payable abroad, it may not be altogether useless, with a view, as well to the right understanding of such decisions as have already been pronounced, as to the solution of such undecided questions on the same subject as may hereafter arise, first to enumerate some of the general principles which seem to have guided the English Courts in determining the circumstances, and the degree in which they will respect foreign laws, in interpreting contracts either altogether or partially foreign, and then to adduce instances illustrating the application of those principles to the Law of Bills of Exchange.

(*a*) See the well known and very learned work on the CONFLICT OF LAWS, for which not only his own country and the United Kingdom, but Europe and the civilized world, are deeply indebted to the late Mr. Justice Story.

CHAPTER XXXII.

Among established principles in the law of this country, the five (*b*) following rules appear to rank.

LEX LOCI CONTRACTUS.

First, every contract is, in general, to be regulated by the laws of the country in which it is made. For the laws of that country alone are there binding *proprio vigore* on aliens as well as on natural-born citizens or subjects (*c*), and the parties to the contract may generally be taken to have contemplated the legal consequences which those laws deduce from their stipulations.

Hence the formalities essential to the validity of the contract, and the interpretation of that contract, are to be governed by the laws of the country where it is made.

LEX LOCI SOLUTIONIS.

But, secondly, where a contract is made in one country to be performed in another, the country where the contract is to be performed is deemed the country in which it was made. Such seems to be the general rule of the civil law. "*Contraxisse unusquisque in eo loco intelligitur, in quo ut solveret se obligavit.*" Some learned civilians have, indeed, entertained a different opinion, but such is unquestionably the general rule in the common law of England. "The law of the place," says Lord Mansfield, "can never be the rule, where the transaction is entered into with the express view to the law of another country, as the rule by which it is to be governed" (*d*).

Contracts against morals, the law of nations, or British interest.

Thirdly, contracts immoral, or contrary to the law of nations, or injurious to British public interests, though valid where made, will not be enforced on behalf of a guilty party in our Courts.

Infringing revenue laws.

But, fourthly, one country will not regard the revenue laws of another country.

(*b*) That is to say, as to executory contracts and contracts relating to moveables. But the transfer of real or immoveable property is governed by another rule, the *lex rei sitæ*. See *Fenton* v. *Levington*, Dom. Proc. 1859.

(*c*) According to some foreign writers, the domicil of persons entering into contracts, while in a foreign country, is to be considered in those contracts. Difficulties then arise, where the domicil of two or more of the contracting parties is not the same. The common law does not, it should seem, regard these niceties. *Jefferys* v. *Boosey*, 4 H. of L. Cases, 814; 24 L. J., Exch. 81. See as to a case of judgment in rem Castrique Imey LR 4 H.L.

But *quære*, how far the domicil of parties to bills of exchange regulates their personal capacity or incapacity to contract.

(*d*) *Robinson* v. *Bland*, 2 Burr. 1077; 1 W. Bl. 256, S. C.; and see *Rothschild* v. *Currie*, 1 Q. B. 43; see Story's Conflict of Laws, 280 to 281; *Allen* v. *Kemble*, 6 Moore, P. C. C. 314.

CHAPTER XXXII.

LEX FORI.

Fifthly, the remedy is to be governed by the law of the country, where that remedy is sought.

CASES WHERE THE LEX LOCI CONTRACTUS GOVERNS.

The following are instances of the supremacy of the *lex loci contractus* according to the first general rule.

Foreign acceptance.

An acceptance void, or avoided by the law of the country where it is given, is not binding here. By the law of Leghorn, if a bill be accepted, if the drawer then fail, and the acceptor had not sufficient effects of the drawer in his hands at the time of acceptance, the acceptance becomes void. An acceptor at Leghorn, under these circumstances, instituted a suit at Leghorn, and his acceptance was thereupon vacated. Afterwards, he was sued in England as acceptor, and now filed his bill for an injunction and relief. Lord Chancellor King granted a perpetual injunction, injoining the plaintiff at law from suing on the bill (*e*).

Foreign indorsement of foreign note.

A bill of exchange was drawn in France, and indorsed in blank in France, without following the formalities prescribed by the French law. It was held that the indorsement being void by the French law was void here, for that the contract and indorsement being made in France must be governed by the law of France (*f*).

Foreign discharge.

Where the defendant gave the plaintiff, in a foreign country where both were resident, a bill of exchange drawn by the defendant on a person in England, which bill was afterwards protested here for non-acceptance, and the defendant afterwards, while still resident abroad, became bankrupt there, and obtained a certificate of discharge by the law of that state, it was held that such certificate was a bar to an action here, founded upon an implied assumpsit to pay the amount of the bill, because the implied contract was made abroad (*g*). So payment of part in discharge of the whole of a debt, though ineffectual by the law of England, will nevertheless bar the whole debt even here, if the payment were made in a foreign country, by the law of which it would have that effect (*h*).

But a discharge by the law of a place where the contract was neither made nor to be performed, is not a discharge

(*e*) *Burrows* v. *Jemino*, 2 Stra. 733; Sel. C. 144; 2 Eq. Ab. 526; see *Wynne* v. *Calendar*, 1 Russ. 295.

(*f*) *Trimby* v. *Vignier*, 1 Bing. N. C. 151; 4 M. & S. 695; 6 C. & P. 25, S. C.; but see *Wynne* v. *Jackson*, 2 Russ. 51.

(*g*) *Potter* v. *Brown*, 5 East, 124; 1 Smith, 351, S. C.

(*h*) *Ralli* v. *Dennistoun*, 6 Exch. 483.

in any other country (*i*). Therefore, to an action against the acceptor of an English bill, the discharge of the acceptor under a colonial bankruptcy in Australia is no defence (*j*). It is otherwise in the case of a Scotch bankruptcy, for that operates under a direct enactment of the Imperial legislature (*k*).

An I O U given for money lent in Germany, to play there at games of chance, not illegal in Germany, is valid here (*l*).

CASES IN WHICH THE LEX LOCI SOLUTIONIS GOVERNS.

The following are cases in which the *lex loci solutionis* has been held to govern.

Foreign indorsement of English note or bill.

A promissory note, or bill of exchange, payable to bearer, made and payable in England, is transferable by delivery abroad, although by the law of the country where the delivery takes place, mere delivery is inoperative (*m*).

Time of payment.

The time of payment is to be calculated according to the law of the country where the bill is made payable (*n*). For example, the days of grace.

Protest and notice of dishonour.

The notice of dishonour given and received in a foreign country must be regulated by the law of that country.

It has also been held, that not only the protest but the notice of dishonour transmitted from a foreign country must be regulated by the law of the country where the bill is payable. A bill was drawn in England in favour of the defendant, a payee in England, on a house in Paris, and accepted in Paris, *payable there*, and indorsed to the plaintiff in England. The bill being dishonoured by non-payment, notice was given to the plaintiff in England, which notice was good according to the French law, but too late according to the English law. The notice was transmitted the same day by the plaintiff to the defendant. An action was brought in England by the plaintiff, the English in-

(*i*) Story's Conflict of Laws, s. 342.

(*j*) *Bartley* v. *Hodges*, 30 L. J., Q. B. 352.

(*k*) *Smith* v. *Buchanan*, 1 East, 6; *Phillips* v. *Allan*, 8 B. & C. 477.

(*l*) *Quarrier* v. *Colston*, 12 L. J., Chan. 57; 1 Ph. 147, S. C.

(*m*) *De la Chaumette* v. *Bank of England*, 2 B. & Ad. 385; 9 B. & C. 208; S.C., *Lebel* v. *Tucker*, L. R., 3 Q. B. 77; *Gorgier* v. *Mieville*, 3 B. & C. 45, cited in *Miller* v. *Race*, Smith's Leading Cases, vol. I, 483. But see *Bradlaugh* v. *De Rin*, L. R., 3 C. P. 538, where however it should be observed that the court was not unanimous, and an appeal is still pending.

(*n*) Beawes, 151; Marius, 75, 89 to 92, 101 to 103; Bayley, 6th ed. 249. See ante, Chapter on PRESENTMENT FOR PAYMENT.

CHAPTER XXXII.

dorsee, against the defendant, an English indorser. It was insisted by the defendant that the requisites of the notice, which was received in England, should, as between the indorsee and indorser both domiciled in England, be regulated by the English law. But the Court of Queen's Bench held, that the bill being payable in France was to be considered, even as between the indorsee and indorser, as a French contract, and that the French law, as to the notice of dishonour transmitted from France to England, must therefore so far prevail (*o*).

Acceptance at a particular place.

Where a bill is made payable at a particular place either by the acceptor himself or by the drawer, the law of acceptance prevailing at that place governs the contract of acceptance (*p*).

General acceptance.

But a general acceptance being a contract to pay everywhere, is governed by the law of the place where it is given, for it is payable there as well as in every other place (*q*).

Rate of interest.

A bill was drawn in California, where the rate of interest is twenty-five per cent., on a drawee at Washington, where the rate of interest is only six per cent.; in an English action against the drawer the Californian rate of interest is recoverable (*r*); but in an action against the acceptor the Washington rate of interest would alone be recoverable (*s*).

IMMORAL, ILLEGAL AND INJURIOUS CONTRACTS.

The third rule is, that contracts immoral, or contrary to the law of nations, or injurious to British public interests, will not be enforced on behalf of a guilty party in our Courts.

The reason is, that the laws of foreign countries are admitted in our Conrts, not *proprio vigore* but *ex comitate.* The judicial power of every country must reserve to itself a

(*o*) *Rothschild* v. *Currie*, 1 Q. B. 43, doubted in *Gibbs* v. *Fremont*, 22 L. J., Exch. 5; 9 Exch. 31, S. C.; and by Story, p. 197; but recently recognized and followed by the Court of Common Pleas in *Hirschfield* v. *Smith*, 35 L. J., C. P. 177; L. R., 1 C. P. 340. S. C. See also *Allen* v. *Kemble*, 6 Moore, P. C. C. 314, where it was held that the drawer is liable, according to the law of the country where the bill is drawn.

(*p*) See the American authorities, Byles on Bills, 5th American ed. 568.

(*q*) *Don* v. *Lipman*, 5 Cl. & Fin. 1, 12, 13; *Sproule* v. *Legge*, 1 B. & C. 16; 2 D. & R. 15; 3 Stark. 156, S. C.; *Kearney* v. *King*, 2 B. & Ald. 301.

(*r*) *Gibbs* v. *Fremont*, 9 Exch. 31.

(*s*) See *Cooper* v. *Earl of Waldegrave*, 2 Beav. 282; *Cougan* v. *Banks*, Chitty on Bills, 683; *Allen* v. *Kemble*, 6 Moore, P. C. C. 314.

discretion as to the laws it will enforce (*t*), otherwise it might in some cases be governed by barbarous and pernicious rules.

REVENUE LAWS OF OTHER COUNTRIES DISREGARDED.

The following are instances of the application of the fourth rule, that the English Courts will not regard the revenue laws of other countries (*u*).

Stamps on foreign bills.

Bills or notes drawn or made in a foreign independent state, or at sea (except those payable to bearer on demand), do not require, in order to their validity in this country (*x*), a stamp of the country where they are made or drawn (*y*). "In the time of Lord Mansfield," observes Abbott, C. J. (*z*), "it became a maxim, that the Courts of this country will not take notice of the revenue laws of a foreign state. There is no reciprocity between nations in this respect. Foreign states do not take any notice of our Stamp Laws, and why should we be so courteous to them, when they do not give effect to ours? It would be productive of prodigious inconvenience if, in every case in which an instrument was executed in a foreign country, we were to receive in evidence what the law of that country was, in order to ascertain whether the instrument was or was not valid." But bills drawn in England and payable abroad are, as we have seen, subject to an English stamp. If a bill be drawn in England, on a person abroad, and made payable in England, by both drawer and acceptor, it requires to be stamped as an inland bill (*a*).

On Irish or colonial bills.

If the bill or note were made in any part of the British empire, it must have the stamp appropriated by the law of the place (*b*).

(*t*) See the American authorities, Byles on Bills, 5th American ed. p. 563.

(*u*) See *Pellecat* v. *Angell*, 2 C. M. & R. 311.

(*x*) But as to the new English stamp on foreign bills see the Chapter on THE STAMP.

(*y*) *Rotch* v. *Edie*, 6 T. R. 425; *Boucher* v. *Lawson*, Rep. temp. Hardwicke, 198; *Holman* v. *Johnson*, Cowp. 343; *Clugas* v. *Penaluna*, 4 T. R. 467.

(*z*) *James* v. *Catherwood*, 3 D. & R. 199; *Wynne* v. *Jackson*, 2 Russ. 351; but see the note to Story's Conflict of laws, 2nd ed. p. 341; *Bristow* v. *Seequeville*, 19 L. J., Ex. 289; 5 Exch. 275, S. C.

(*a*) *Amner* v. *Clark*, 2 C., M. & R. 468.

(*b*) *Alves* v. *Hodgson*, 7 T. R. 241; *Clegg* v. *Levy*, 3 Camp. 166. A local stamp law must be proved by the person who relies on it. *Buchanan* v. *Rucker*, 1 Camp. 63; *Le Chominant* v. *Pearson*, 4 Taunt. 367; *Millar* v. *Heinrick*, 4 Camp. 155.

CHAPTER XXXII.

Mode of raising the objection to the want of a stamp.

If an unstamped bill tendered in evidence as a foreign bill be really drawn in England, the proper course is for the defendant to object to the admissibility of the bill, and at once to give his evidence on the point, and for the Judge to decide whether it be a foreign or an inland bill (*c*).

What is such a making within the kingdom as to subject to a stamp.

A question sometimes arises as to what shall be such a making within this country as to subject to the English Stamp Laws. The firm of B. & C., in Ireland, had one partner, A., resident in this country, where he also carried on a separate trade. They sent him over four signatures, made by them, on copperplate impressions, as drawers and indorsers, with blanks for dates, sums and drawees' names, He filled them up and used them. It was held, that as the bills were *signed* in Ireland, they must be considered as *made* there, and, consequently, that they only required an ~~*Irish* stamp~~ (*d*). So, where a bill was drawn in Jamaica, on a stamp of that island only, and a blank was left for the payee's name, it was held that an English stamp was not necessary to the validity of the insertion of the bearer's name in England (*e*). So, a bill sketched out and accepted here, but afterwards signed by the drawer abroad, is to be considered as *made* abroad; or *vice versâ*, signed by the drawer abroad and filled up here (*f*).

Presumption that a bill purporting to be a foreign bill was drawn abroad.

The presumption is, that a bill, purporting to be drawn abroad, was really so drawn. But evidence is admissible to show that a bill, purporting to have been drawn abroad, was in fact drawn in England, and was, therefore, formerly void for want of a stamp. If a bill purported to be drawn abroad, and the defence was, that it was drawn here, and therefore should have had a stamp, the proof must have been most distinct and positive. Action on a bill dated Paris, 1st

(*c*) *Bartlett* v. *Smith*, 11 M. & W. 483. No party is estopped from objecting to the stamp; *Steadman* v. *Dukamel*, 1 C. B. 288.

(*d*) *Snaith* v. *Mingay*, 1 M. & Sel. 87; *Baker* v. *Sterne*, 9 Exch. 684.

(*e*) *Crutchley* v. *Mann*, 5 Taunt. 529; 1 Marsh. 29, S. C.

(*f*) *Barker* v. *Sterne*, 9 Exch. 684. In *Chapman* v. *Cotterell*, 34 L. J., Exch. 186, a writ was issued against the defendant as one of the makers of a joint and several promissory note. He was a British subject residing at Florence, where he drew and signed the note, and sent it by post to his brother in England, the other maker of the note. The latter signed it and paid it into a bank. It was held that a cause of action arose in England upon the delivery of the note to the payee.

March: defence, that it was drawn in London, and proof that the drawer was in London, the 3rd March, at eleven in the forenoon. Lord Ellenborough:—"It is not very probable this bill was drawn in Paris, on the 1st March; but if it were proved ever so distinctly that it was not drawn in Paris on the 1st of March, it would not follow that it was not drawn there at some other time, or that it was drawn in England. Drawing here with a foreign date, to evade the stamp duties, is a very serious offence, and the fact must be made out by distinct evidence" (*g*).

Even a party to the fraud was not precluded from showing that a bill purporting to be a foreign bill, is really an inland one (*h*).

But now by the Stamp Act of 1854, 17 & 18 Vict. c. 83, s. 4, every bill purporting to be drawn out of the United Kingdom shall, for all the purposes of that act, be deemed to be a foreign bill.

APPLICATION OF THE LEX FORI TO FOREIGN BILLS.

The following are instances of the application to bills of exchange of the last rule, viz.;—that though the *lex loci contractus* must regulate and interpret the contract, yet that the *lex fori* must govern the remedy.

Statutes of Limitation.

Statutes of Limitation in general affect the remedy only and not the substance of the contract (*i*).

Therefore, where, by the law of the country where the contract was made, the plaintiff would have had forty years to bring his action, yet, as he sued in England, it was held, that he must bring his action within six years (*k*). So on the other hand, though the payee of a French promissory note must, if he had sued in France, have brought his action

(*g*) *Abraham* v. *Dubois*, 4 Camp. 269; *Bire* v. *Moreau*, 2 C. & P. 376.

(*h*) *Steadman* v. *Duhamel*, 1 C. B. 288.

(*i*) *Quære*, whether that be so where the statute not merely limits the remedy but actually extinguishes the debt. See *Huber* v. *Steiner*, 2 Bing. N. C. 202, 211; 2 Scott, 304; 1 Hodges, 206, S. C.; *Don* v. *Lipman*, 5 Cl. & Fin. 1, 16, 17; Story, 2nd ed. 840. In such a case it should seem that the statute is equivalent to a release.

The rule as to the application of the Statute of Limitations in America has been held to depend on the law of the State where a note is made and the length of the residence there (Byles on Bills, 5th American ed. p. 571); but the English rule is doubtless the true one. See *Alvarez de la Rosa* v. *Prieto*, 33 L. J., C. P. 262.

(*k*) *British Linen Company* v. *Drummond*, 10 B. & C. 903.

CHAPTER XXXII.

there within five years, it was held that he might here bring his action at any time within six years (*l*).

Set-off.

So, the power to set off a cross debt depends on the law of the country where the remedy is sought (*m*).

Power of arrest.

So, though a defendant may not be subject to arrest in the country where the contract is made, yet he is subject to arrest where the law of this country gives the creditor the right to arrest, if the remedy be sought here (*n*).

So, where by the law of the foreign country a criminal prosecution must be a preliminary to a civil action, the absence of such a previous prosecution is no defence to an action here (*o*).

Statute of Frauds.

So, again, the fourth section of the Statute of Frauds enacts, that *no action shall be brought* on certain agreements unless they are in writing. It has been held that this enactment does not affect the solemnities of the contract but only the rules of procedure. And, therefore, though a parol contract, within the fourth section of the Statute of Frauds, be made in France, and be valid there, yet that an action on it will not lie in England (*p*).

Protest and notice of dishonour.

The protest and notice of dishonour are parcel of the contract, and not incidents of the remedy for the breach of it. They must, therefore, be regulated by the law of the country where the bill is payable (*q*), or where the contract is made or where the notice is given, and not solely by the law of the country where the remedy is sought.

Pleading foreign law.

When foreign law is relied on in pleading, it is proper first to state what the foreign law is, and then to allege the facts, bringing the case within that foreign law (*r*).

Burthen of proof.

It will in general be assumed, that the law of a foreign country is the same as the law of this country in respect of

(*l*) *Huber* v. *Steiner*, 2 Bing. N. C. 202; 2 Scott, 304; 1 Hodges, 206, S. C.; *Harris* v. *Quine*, L. R., 4 Q. B. 653. See *Don* v. *Lipman*, 5 Cl. & Fin. 1, 15, 16.

(*m*) Byles on Bills, 5th American ed. p. 572.

(*n*) *De la Vega* v. *Vianna*, 1 B. & Ad. 284; and see *Shaw* v. *Harvey*, M. & M. 526.

(*o*) *Scott* v. *Lord Seymour*, 31 L. J., Exch. 457.

(*p*) *Leroux* v. *Browne*, 12 C. B. 801.

(*q*) *Rothschild* v. *Currie*, 1 Q. B. 43. See *Rothschild* v. *Barnes*, Q. B. 1842.

(*r*) *Benham* v. *Lord Mornington*, 8 C. B. 133.

negotiable instruments till the contrary be proved. Therefore, if a promissory note made in Scotland (*s*) be sued upon in this country, and there be any difference in the law of the two countries favorable to the defendant, it lies upon the defendant to prove that difference (*t*).

(*s*) As to the law of Scotland, see 19 & 20 Vict. c. 60.

(*t*) *Brown* v. *Gracey*, D. & R., N. P. C. 41, n., per Abbott, C. J., but see *De la Chaumette* v. *Bank of England*, and *Gibbs* v. *Fremont*, supra. As to the mode of ascertaining, proving and applying the law of foreign countries, see 24 Vict. c. 11.

CHAPTER XXXIII.

OF THE REMEDY BY ACTION ON A BILL.

Who may sue on a Bill . 402
In another's Name . . 403
Joining Count on Consideration . . . 403
Against what Parties Actions may be brought . 403
Judgment against two Parties 403
Where Defendant is liable in two Capacities on the same Bill . . . 403
PROCEEDINGS FOR COSTS . 404
Costs of Actions that have been brought against the Party suing . . . 404
TROVER OR DETINUE FOR A BILL 404
Who may sue . . . 405
Amount of the Verdict . 405
Effect of Judgment in changing Property . 405
Relief in Equity . . 405
AFFIDAVIT TO HOLD TO BAIL 405
Arrest for Interest . . 406
Statement of the Sum . 406
That the Bill is due . . 406
Statement of Indorsements . 406
Character of Defendant . 406
Character of Plaintiff . 407
Description of Defendant by his Initials . . 407
Statement of Consideration 407
Affidavit good in Part . 407
Statute 18 & 19 *Vict. c.* 67 408
VENUE 410
INSPECTION OF THE BILL 410
PARTICULARS OF DEMAND 410
Tender 410
Consolidating Actions . 411
STAYING PROCEEDINGS . 411
In an Action against the Acceptor . . . 411
When without the Costs in other Actions . . 411
Summary Interposition of the Court . . . 412
Setting aside Pleas . . 412
Re-exchange . . . 412
Other Damages . . 413
Advantages of suing on the Bill rather than on the Consideration . . 414
Interposition of Equity . 414
When Equity will restrain an Action . . . 414
Discovery in Aid of Action or Defence . . . 415

CHAPTER XXXIII.

Who may sue on a bill.

THE holder of the bill at the time of action brought, *i.e.* the person who is then entitled at law to receive its contents, is the only person who can then sue on it (*a*). It is a good defence, that at the time of action commenced the bill was outstanding in the hands of an indorsee. But if such indorsee held the bill as agent or trustee for the plaintiff, the plaintiff may sue, though not in actual possession of the

(*a*) *Emmett* v. *Tottenham*, 8 Ex. 884; *Gill* v. *Lord Chesterfield*, ib.; and see *Jungblath* v. *Way*, 25 L. J., Exch. 257; 1 H. & N. 71, S. C.

bill (*b*), even though the agent's authority depend on a ratification after action brought (*c*).

Suing in the name of another.

An indorser who pays an indorsee has no right to sue a prior party in the name of the indorsee without his consent, and the Court has allowed the defendant, as well as the indorsee, whose name has been usurped, to raise the objection (*d*).

Joining count on consideration.

Where there is a count on the bill, and a count on the consideration, the plaintiff may be entitled to enter his verdict on both counts (*e*).

Against what parties actions may be brought.

Wherever, to the holder of a bill, several parties are liable, he is not obliged to single out one only, but may proceed at once in distinct and concurrent actions against them all, or against as many as he may think fit; but a substantial and not a mere technical satisfaction of the debt by any one will discharge all subsequent parties (*f*).

Judgment against two parties.

After a party has once levied the amount of the debt on the goods of one party, the Court will grant a rule to restrain him from levying it over again on the goods of another, and have intimated that they would punish a plaintiff who should take out execution on both judgments (*g*).

Where defendant is liable in two capacities on the same bill.

If a party be liable on a bill in two or more capacities, he may be the object of several actions on the same bill, at the suit of the same plaintiff. Thus, where a party was sued jointly with others, as a drawer, and separately as the acceptor, of a bill, the Court, considering him liable in the two characters, and the plaintiff entitled to both remedies, which could not be comprised in the same declaration, refused to stay the proceedings in either, as vexatious (*h*).

(*b*) *Stones* v. *Butt*, 2 C. & M. 416; 2 Dowl. P. C. 335; *Dabbs* v. *Humphries*, 10 Bing. 446; 1 Scott, 325, S. C.; 4 Moore & S. 285, S. C.; *Ancona* v. *Marks*, 7 H. & N. 686; *National Savings Bank* v. *Tranah*, L. R., 2 C. P. 556; 36 L. J. 260.

(*c*) *Ancona* v. *Marks*, ubi supra.

(*d*) *Coleman* v. *Bredman*, 7 C. B. 871; but see *Doe* d. *Vine* v. *Figgins*, 8 Taunt. 440.

(*e*) *Ryder* v. *Ellis*, 8 C. & P. 357.

(*f*) He may now even join all defendants in one writ of summons; 18 & 19 Vict. c. 67, s. 6.

(*g*) *Windham* v. *Wither*, 1 Stra. 515; *Ex parte Wildman*, 2 Ves. n. 115.

(*h*) *Wise* v. *Prowse*, 9 Price, 393.

CHAPTER XXXIII.

PROCEEDINGS FOR COSTS.

Though, after the principal sum due on a bill has been once paid, or levied upon the goods of the party ultimately liable, the holder cannot recover it again from any other of the parties, yet if other actions were pending at the time of payment, he may proceed in them for costs, without recovering any part of the principal sum (*i*).

Costs of actions that have been brought against the party suing.

Indorsers, who have to pay costs of actions against them, cannot sustain an action for those costs against the acceptor (*j*), nor, it is conceived, against any other party.

In common language, a bill accepted or indorsed without any consideration moving to the party making himself liable on the bill, is called an accommodation bill; but, in strictness (*k*), an accommodation bill is not merely a bill accepted or indorsed without value received by the acceptor or indorser, but a bill accepted or indorsed without value by the acceptor or indorser, *to accommodate* the drawer, or some other party; *i. e.* that the party accommodated may raise money upon it, or otherwise make use of it. This distinction is of importance; for a party accepting a bill merely without consideration (as if, for example, he does not know the state of accounts between himself and the drawer), and afterwards sued on that bill, cannot charge the drawer with the costs of defending the action (*l*); whereas, the acceptor of an accommodation bill, properly so called, who is compelled by an action to pay it, may have a claim upon the drawer for all the expenses of the action (*m*).

But an accommodation acceptor has no right to charge the party accommodated with the costs of an action, to which the accommodation acceptor had evidently no defence (*n*).

TROVER OR DETINUE FOR A BILL.

An action not only lies on a bill, but for a bill. Trover or detinue may be brought.

(*i*) *Toms* v. *Powell*, 7 East, 536; 3 Smith, 554; 6 Esp. 40, S. C.; *Page* v. *Wiple*, 3 East, 314; *Godard* v. *Benjamin*, 3 Camp. 33; *Holland* v. *Jourdine*, Holt's N. P. C. 6; *Goodwin* v. *Cremer*, 18 Q. B. 757.

(*j*) *Dawson* v. *Morgan*, 9 B. & C. 618.

(*k*) See ante, p. 129.

(*l*) *Bagnall* v. *Andrews*, 7 Bing. 217; 4 Moo. & P. 839, S. C. See *Tindal* v. *Bell*, 11 M. & W. 228; *Romberg* v. *Falkland Islands Company*, C. P., T. T. 1864.

(*m*) *Ex parte Marshall*, 1 Atk. 262; *Jones* v. *Brooke*, 4 Taunt. 464; *Stratton* v. *Matthews*, 18 L. J., Exch. 5; 3 Exch. 48, S. C. *Garrard* v. *Cottrell*, 10 Q. B. 679.

(*n*) *Roach* v. *Thompson*, M. & M. 487; *Beech* v. *Jones*, 5 C. B. 696.

Who may sue.

Trover will lie at the suit of one who has property in the bill, though no party to it (*o*), or at the suit of the payee or acceptor, against a defendant to whom the plaintiff's agent has wrongfully assigned it, though the defendant has a right of action on the bill against the agent (*p*).

Amount of the verdict.

In an action of trover, where there has been a final appropriation of the bill, a verdict may be given for the full value; but if the defendant deliver up the bill, nominal damages may be entered on the record (*q*).

Effect of the judgment in changing the property.

A recovery in an action of trover, and payment of the damages, being the value of the bill, divests the property out of the plaintiff, and vests it in the defendant (*r*), as against the plaintiff. And that from the period of the conversion (*s*).

Relief in equity.

If a plaintiff fail in an action of trover, he may nevertheless apply to a Court of equity to have the bill delivered up (*t*).

AFFIDAVIT TO HOLD TO BAIL.

A defendant cannot now be arrested on a bill of exchange unless the cause of action amounts to 20*l*., and there be probable cause for believing that he is about to quit England (*u*).

Under the old law, where a party was to be arrested on a bill or note, some material points were to be attended to in the affidavit to hold to bail. "The strictness required in these affidavits," says Lord Ellenborough, "is not only to guard defendants against perjury, but also against any misconception of the law by those who make affidavits; and the leaning of my mind is always to great strictness of construction, where one party is to be deprived of his liberty by the act of another" (*v*). And these precautions are still, in many cases, necessary where the plaintiff arrests under the existing statute.

(*o*) *Treuttel* v. *Barandon*, 8 Taunt. 100; 1 Moore, 543, S. C.

(*p*) *Goggerley* v. *Cuthbert*, 2 N. R. 170; *Evans* v. *Kymer*, 1 B. & Ad. 528; see *Cranch* v. *White*, 1 Bing. N. C. 414; 1 Scott, 314; 6 C. & P. 767, S. C. See also *Symonds* v. *Atkinson*, 25 L. J., Ex. 313; 1 H. & N. 146, S. C.

(*q*) Ibid. *Alsager* v. *Close*, 10 M. & W. 576. As to the interest recoverable in trover, see the Chapter on INTEREST.

(*r*) See *Holmes* v. *Wilson*, 10 Ad. & E. 511; *Cooper* v. *Willomatt*, 1 C. B. 672.

(*s*) *Cooper* v. *Shepherd*, 3 C. B. 266.

(*t*) *Lisle* v. *Liddle*, 3 Anstr. 649.

(*u*) 1 & 2 Vict. c. 110, s. 3.

(*v*) *Taylor* v. *Forbes*, 11 East, 315.

CHAPTER XXXIII.

Arrest for interest.

A man could not, formerly, have been arrested for interest on a bill unless made payable on the face of the bill (*w*).

Statement of the sum.

The affidavit must, therefore, have stated the sum for which the bill was drawn (*x*).

That the bill is due.

It was necessary in all cases, even in an action against an indorser or drawer, though they could not otherwise have become indebted, to state that the bill was due (*y*), or, at least, to show the date, and when it was payable (*z*).

Statement of indorsements.

The affidavit need not have stated all the intervening indorsements mentioned in the declaration (*a*), but it must have stated by whom the bill was indorsed, and it was not sufficient to state that it was duly indorsed (*b*).

Character of defendant.

The affidavit must also have shown in what character the defendant became a party to the bill or note, whether as drawer, indorser or acceptor (*c*). Thus where, in a recent case, the affidavit to hold to bail stated the defendant to be *duly* indebted to the plaintiff upon a promissory note for 10,000*l.* drawn in favour of A. B., and *duly* indorsed to the plaintiff, though it was urged that an indorsement by the defendant was implied by the word *duly*, the Court held the affidavit insufficient, and set aside the bail bond (*d*).

(*w*) *Latraille* v. *Hoepfner*, 10 Bing. 334; 3 M. & Sc. 800, S. C.; *Hutchinson* v. *Hargrave*, 1 Bing. N. C. 369.

(*x*) *Brook* v. *Coleman*, 2 Dowl. P. C. 7; 1 C. & M. 622, S. C.; *Westmacott* v. *Cook*, 2 Dowl. 519, overruling *Hanley* v. *Morgan*, 2 C. & J. 331; 1 Dowl. 322, S. C.; *Lewis* v. *Gompertz*, 2 C. & J. 352; 1 Dowl. 319, S. C. It need not state notice of dishonour. *Banting* v. *Jadis*, 1 Dowl. P. C. 445; *Cross* v. *Morgan*, ibid. 122; *Buckworth* v. *Levy*, 7 Bing. 251; 5 M. & P. 23, S. C.; 1 Dowl. P. C. 211, S. C.

(*y*) *Edwards* v. *Dick*, 3 B. & Ald. 496, overruling *Davison* v. *March*, 1 N. R. 157; *Kirk* v. *Almond*, 2 C. & J. 354; 1 Dowl. 318, S. C.; and see *Holcombe* v. *Lambkin*, 2 M. & Sel. 475, and *Machu* v. *Fraser*, 7 Taunt. 171; *Jackson* v. *Yate*, 2 M. & Sel. 148.

(*z*) *Shirley* v. *Jacobs*, 3 Dowl. 101; *Phillips* v. *Turner*, 1 C., M. & R. 597; 3 Dowl. 163, S. C. It has been held insufficient to allege in an affidavit against the drawer that the acceptor made default. *Caunce* v. *Rigby*, 3 M. & W. 67; but see *Witham* v. *Gompertz*, 2 C., M. & R. 736; and see *Crosby* v. *Clarke*, 1 M. & W. 296. The presentment and default should be specially alleged. *Buckworth* v. *Levy*, 7 Bing. 251; 5 M. & P. 23; 1 Dowl. 211, S. C.; *Simpson* v. *Dick*, 3 Dowl. 731; *Banting* v. *Jadis*, 1 Dowl. 445.

(*a*) *Luce* v. *Irwin*, 3 M. & W. 27.

(*b*) *Lewis* v. *Gompertz*, 2 C. & J. 352; 1 Dowl. 319, S. C.; *M'Taggart* v. *Ellice*, 4 Bing. 114; 12 Moore, 326, S. C.

(*c*) *Humphries* v. *Winslow*, 2 Marsh. 281; 6 Taunt. 531, S. C.

(*d*) *M'Taggart* v. *Ellice*, 4

But it is not clear that it need have specified in what character the plaintiff sued (*e*).

Character of plaintiff.

It was formerly not sufficient to state merely the initials of the christian name of the defendant, though the initials only appeared on the bill, and though due inquiry had been made to ascertain his name without effect (*f*).

Description of defendant by his initials.

But now it is enacted by 3 & 4 Will. 4, c. 42, s. 12, that in all actions upon bills of exchange or promissory notes, or other written instruments, the parties to which are designated by the initial letter or letters, or some contraction of the christian or first name or names, it shall be sufficient, in every affidavit to hold to bail, and in the process or declaration, to designate such persons by the same initial letter or letters, or contraction of the christian or first name or names, instead of stating the christian or first name or names in full (*g*).

The affidavit need not state whether the bill be foreign or inland (*h*).

Statement of consideration.

Where the action is between immediate parties, so that the plaintiff can recover on the consideration, it should be stated in the affidavit; for, otherwise, should the plaintiff fail on the count on the bill, and recover on a count on the consideration, the bail will be discharged (*i*).

An accommodation acceptor may hold the drawer to bail for costs of an action brought against the acceptor (*j*).

Bing. 114; 12 Moore, 326, S. C.; *Lewis* v. *Gompertz*, 2 C. & J. 352; 1 Dowl. 319, S. C. See *Harrison* v. *Rigby*, 3 M. & W. 66; 6 Dowl. 93, S. C.

(*e*) *Bradshaw* v. *Saddington*, 7 East, 94; 3 Smith, 117, S. C. *Balbi* v. *Batley*, 1 Marsh. 424; 6 Taunt. 25, S. C.; *Machu* v. *Fraser*, 7 Taunt. 171; *Lamb* v. *Newcomb*, 5 Moore, 14; 2 B. & B. 343, S. C.; *Warmsley* v. *Macey*, 2 B. & B. 338; 5 Moore, 52, S. C. See *Mammatt* v. *Mathew*, 10 Bing. 506.

(*f*) *Reynolds* v. *Hankin*, 4 B. & Ald. 537, overruling *Howell* v. *Coleman*, 2 B. & P. 466; and see *Coles* v. *Gum*, 1 Bing. 424; 8 Moo. 526, S. C.

(*g*) *Esdaile* v. *McLean*, 15 M. & W. 277. Before this statute it had been provided by R. Hil. 2 Will. 4, r. 32, that a description of the defendant in the process or affidavit by his initials or a *wrong* name, or without a christian name, should not entitle him to a discharge, provided due diligence had been used to obtain a knowledge of his true name.

(*h*) *Phillips* v. *Donn*, 18 L. J., Q. B. 104; 6 D. & L. 527, S. C.

(*i*) *Wheelwright* v. *Jutting*, 7 Taunt. 304; 1 Moore, 51, S. C. *Levy* v. *Webb*, 9 Q. B. 427; and see *Caswell* v. *Coare*, 2 Taunt. 107; and *Wilks* v. *Adcock*, 8 T. R. 27; *Edge* v. *Frost*, 4 D. & R. 245.

(*j*) *Stratton* v. *Mathews*, 18 L. J., Exch. 5; 3 Exch. 48, S. C.

CHAPTER XXXIII.

The affidavit may be good in part and bad in part (*k*).

Affidavit good in part.

Statute 18 & 19 Vict. c. 67.

A more speedy mode of proceeding upon bills of exchange and promissory notes than in an ordinary action has been given by the 18 & 19 Vict. c. 67 (*l*). This statute enacts, that all actions upon bills of exchange or promissory notes (*m*) commenced within six months (*n*) after the same shall have become due and payable, may be prosecuted by writ of summons in the special form contained in the schedule to the act and indorsed as therein mentioned (*o*); and it shall be lawful for the plaintiff, on filing an affidavit of personal service of such writ within the jurisdiction of the Court, or an order for leave to proceed as provided by the Common Law Procedure Act, 1852, and a copy of the writ of summons and indorsement thereon, in case the defendant shall not have obtained leave to appear, and have appeared to such writ according to the exigency thereof, at once to sign final judgment in the form contained in the schedule to the act annexed (on which judgment no proceeding in error shall lie) for any sum not exceeding the sum indorsed on the writ, together with interest at the rate specified (if any) to the date of the judgment, and a sum for costs to be fixed by the Masters of the superior Courts, or any three of them, subject to the approval of the Judges thereof, or any eight of them (of which the Lord Chief Justices and the Lord Chief Baron shall be three), unless the plaintiff claim more than such fixed sum, in which case the costs shall be taxed in the ordinary way, and the plaintiff may upon such judgment issue execution forthwith.

A Judge shall (*p*), upon application within the period of twelve days from such service, give leave to appear to such

(*k*) *Cunliffe* v. *Maltass*, 18 L. J., C. P. 233; 7 C. B. 795.

(*l*) This useful act was introduced by Mr. Justice Keating. For the general rules relating to this act, see Reg. Gen. M. T. 1855, 17 C. B. 1.

(*m*) Promissory notes are within the act; and, on a note payable on demand, the six months run from the date. *Maltby* v. *Murrells*, 29 L. J., Exch. 377; 5 H. & N. 813; S. C.

(*n*) The defendant, by acquiescence, may be prevented from objecting that the writ was not issued within the six months, *Maltby* v. *Murrells*, 5 H. & N. 813; or the writ may be amended and made a specially indorsed writ under the Common Law Procedure Act, *Leight* v. *Baker*, 2 C. B., N. S. 867.

(*o*) See Regula Generalis, Mich. 1855, Appendix. *Hall* v. *Coates*, 25 L. J., Exch. 3; 11 Exch. 476, S. C.; *Robinson* v. *Cotterell*, 11 Exch. 476. The omission of the name of the maker is an irregularity; but the Court, on a motion to set aside the writ, will allow it to be amended. *Knight* v. *Pocock*, 17 C. B. 177; 25 L. J., C. P. 31, S. C.

(*p*) Sect. 2.

writ, and to defend the action, on the defendant paying into Court the sum indorsed on the writ, or upon affidavits satisfactory to the Judge, which disclose a legal or equitable defence, or such facts as would make it incumbent on the holder to prove consideration, or such other facts as the Judge may deem sufficient to support the application, and on such terms as to security or otherwise as to the Judge may seem fit.

After judgment, the Court or a Judge may, under special circumstances, set aside the judgment, and, if necessary, stay or set aside execution, and may give leave to appear to the writ (*q*), and to defend the action, if it shall appear to be reasonable to the Court or Judge so to do, and on such terms as to the Court or Judge may seem just (*r*).

In any proceedings under the act it is competent to the Court or a Judge, to order the bill or note sought to be proceeded upon to be forthwith deposited with an officer of the Court, and further, to order that all proceedings shall be stayed until the plaintiff shall have given security for the costs thereof (*s*).

The expenses of noting for non-acceptance or non-payment may be recovered where they are by law recoverable (*t*).

One writ against several parties.

One writ of summons may be issued against all or any number of the parties to the bill or note, which shall be the commencement of an action against the parties named therein, and all subsequent proceedings shall be in like manner, so far as may be, as if separate writs of summons had been issued (*u*).

A check on a banker is within the act (*x*). So is a note payable on demand, and the six months run from the date of the note (*y*). A count on the consideration of the bill may be included in the declaration (*z*).

(*q*) The Court will not set aside the order for leave to appear on mere contradictory affidavits. *Febart* v. *Stevens*, 30 L. J., Exch. 1.

(*r*) Sect. 8. As to the jurisdiction of the Court, see *Mather* v. *Marsland*, 27 L. J., Exch. 148; *Clay* v. *Turley*, 27 L. J., Exch. 2; *Febart* v. *Stevens*, 30 L. J., Exch. 1; *Pollock* v. *Turnock*, 1 H. & N. 741. *Quære*, whether an executor can be made a defendant under this Act. Per Knight Bruce, L. J., *Marriage* v. *Skiggs*, 5 Jur., N. S. 325; 28 L. J., Ch. 433, S. C.; and *Leigh* v. *Baker*, (*Executrix*,) 2 C. B., N. S. 867. But it is no objection that the holder is an executor.

(*s*) Sect. 4.

(*t*) Sect. 5.

(*u*) Sect. 6.

(*x*) *Eyre* v. *Waller*, 29 L. J., Exch. 246; 5 H. & N. 813, S. C.; *Keene* v. *Beard*, 8 W. R. 469, C. P.

(*y*) *Maltby* v. *Murrells*, 29 L. J., Exch. 377; 5 H. & N. 813, S. C.

(*z*) Reg. Gen. 1858.

CHAPTER XXXIII.

Notwithstanding this act, the provisions of the County Court Acts are applicable to bills of exchange (*a*).

VENUE.

The plaintiff may lay the venue in any county, and the Court will not change it at the instance of the defendant, except upon very special grounds (*b*). This rule applies to actions on specialties, bills and notes, and not to actions on other written contracts (*c*). A banker's check is a bill of exchange within the rule (*d*).

INSPECTION OF THE BILL.

Where a special ground is laid for inspection, the Courts at common law will oblige the plaintiff to allow the defendant to inspect the bill or note on which the action is brought (*e*).

PARTICULARS OF DEMAND.

It has been held, that where particulars of the plaintiff's demand are given, and they do not state the consideration paid for the instrument, such particulars will preclude the plaintiff from giving the consideration in evidence, should he fail on the special count (*f*).

The plaintiff may recover on a bill set out in the declaration, though not mentioned in the particulars (*g*), unless the form of the particulars preclude him.

Particulars, which state the amount of the common counts to be an amount secured by a promissory note, on which note there is a special count, make it necessary to prove the note, in order to recover on the common counts (*h*). Particulars are not evidence, they are only an explanation of the declaration or plea (*i*).

An indorsement on the writ of summons is now in general substituted for general particulars.

Tender.

A tender, after the bill became due, is no defence by the acceptor (*j*). But a drawer or indorser may, perhaps, tender within a reasonable time after dishonour (*k*).

(*a*) 19 & 20 Vict. c. 108, s. 4. See *Harris* v. *Swinburne*, 33 L. J., Q. B. 313; *Holborow* v. *Jones*, L. R., 4 C. P. 14; 38 L. J. 22, S. C.

(*b*) Tidd's Practice, 604.

(*c*) *Mondel* v. *Steele*, 8 M. & W. 640.

(*d*) *Webb* v. *Inwards*, 17 L. J., C. P. 157; 5 C. B. 483, S. C.

(*e*) *Threlfall* v. *Webster*, 1 Bing. 161; 7 Moo. 559, S. C.; Tidd, 591; *Blogg* v. *Kent*, 6 Bing. 614; 4 Moo. & P. 433, S. C. See the Chapter on FORGERY; and *Thomas* v. *Dunn*, 6 M. & G. 274; and the provisions of the act relating to the inspection of documents, 14 & 15 Vict. c. 99.

(*f*) *Wade* v. *Beasley*, 4 Esp. 7.

(*g*) *Cooper* v. *Amos*, 2 Car. & P. 267.

(*h*) *Roberts* v. *Elsworth*, 10 M. & W. 653.

(*i*) *Burkett* v. *Blanchard*, 3 Exch. 89.

(*j*) *Hume* v. *Peploe*, 8 East, 168; *Dobie* v. *Larkin*, 10 Exch. 776.

(*k*) *Walker* v. *Barnes*, 5 Taunt. 240; 1 Marsh. 86, S. C. See

A tender should be unconditional; the party making it cannot require a receipt as a condition precedent, without invalidating the tender. But if the tender be objected to by the creditor on other grounds, the requisition of a receipt becomes immaterial (*l*).

Consolidating actions.

The Courts will sometimes consolidate actions on bills where the parties and the question to be tried in each action are the same (*m*).

STAYING PROCEEDINGS.

If the holder bring concurrent actions against the acceptor, the drawer and the indorsers, the Court will stay the proceedings in any one of those actions, on payment of the amount of the bill, and of the costs in that particular action.

In an action against the acceptor.

But they would not, until recently, have stayed proceedings in an action against the acceptor, except upon the terms of his paying the costs in all the other actions, he being the original defaulter (*n*). For, though no action lies against the acceptor for these costs (*o*), yet when he came to ask a favour, as a stay of proceedings, the Court might with propriety have put him under terms. Now, however, by a late rule of all the Courts, it is ordered that in any action against the acceptor of a bill or maker of a note, the defendant may stay proceedings, on payment of debt and costs in that action only (*p*).

When without costs in other actions.

And where, in an action against the acceptor, an attachment has been obtained against the sheriff for not bringing in the body, the sheriff may be relieved on the payment of the costs of that action only (*q*). And before the late rule, if the actions commenced against the other parties were merely collusive, in order to charge the acceptor with a heavier sum for costs, proceedings against him might have been stayed without payment of those costs (*r*).

ante. But see *Siggers* v. *Lewis*, 1 C., M. & R. 370; 2 Dowl. 681, S. C.

(*l*) *Cole* v. *Blake*, Peake, N. P. C. 179; *Richardson* v. *Jackson*, 8 M. & W. 298.

(*m*) *Booth* v. *Payne*, 11 L. J. Exch. 256; and see *Sharp* v. *Lethbridge*, 4 M. & Gr. 37.

(*n*) *Smith* v. *Woodcock*, 4 Tr. 691; *Windham* v. *Wither*, 1 Str. 515; *Golding* v. *Grace*, 2 W. Bla. 749. See *Lewis* v. *Dalrymple*, 3 Dowl. P. C. 433.

(*o*) *Dawson* v. *Morgan*, 9 B. & C. 618.

(*p*) R. T. T. 1 Vict. and Hil. T. 16 Vict.; and see *Cornes* v. *Taylor*, 10 Exch. 441.

(*q*) *Rex* v. *Sheriffs of London* 2 B. & Ald. 192; *Vaughan* v. *Harris*, 3 M. & W. 542.

(*r*) *Hodson* v. *Gunner*, 2 D. & R. 57.

CHAPTER XXXIII.

Summary interposition of the court.

If the bill or note were obtained by the plaintiff from the defendant without consideration, on an affidavit to that effect by the defendant, the Court will stay the proceedings; but, where there are contradictory affidavits, the Court will not interfere in this summary way, but put the defendant to insist on it as a defence on the trial (*s*). Where an indorsement was made on a promissory note by the plaintiff, the payee, that if the interest were paid on stipulated days during her life the note should be given up, the Court refused to stay proceedings on payment of interest and costs (*t*).

Setting aside plea.

A plea clearly frivolous on the face of it, or tricky and false, or so framed as to prejudice, embarrass or delay the fair trial of the action, will be set aside (*u*).

DAMAGES.

We have already seen that, unless interest be payable by the express words of the instrument, it is in the discretion of the jury to give or withhold it, or to reduce it below 5 per cent., which is the usual rate given. So where the interest on a foreign bill is governed by the law of a foreign country in which the rate of interest is high, the jury may give a much higher rate (*v*).

Re-exchange.

Re-exchange is the difference in the value of a bill, occasioned by its being dishonoured in a foreign country in which it was payable. The existence and amount of it depend on the rate of exchange between the two countries. The theory of the transaction is this: A merchant in London indorses a bill for a certain number of Austrian florins, payable at a future date in Vienna. The holder is entitled to receive in Vienna, on the day of the maturity of the bill, a certain number of Austrian florins. Suppose the bill to be dishonoured. The holder is now, by the custom of merchants, entitled to immediate and specific redress, by his own act, in this way. He is entitled, being in Vienna, then and there to raise the exact number of Austrian florins, by drawing and negotiating a cross bill, payable at sight, on his indorser in London, for as much English money as will purchase in Vienna the exact number of Austrian florins, at the rate of exchange on the day of dishonour; and to include

(*s*) *Turner* v. *Taylor*, Tidd's Pr. 9th ed. 530.

(*t*) *Steel* v. *Bradfield*, 4 Taunt. 227.

(*u*) *Horner* v. *Keppel*, 10 Ad. & E. 17; 3 P. & D. 234, S. C.; *Mitford* v. *Finden*, 8 M. & W. 511; *Knowles* v. *Burward*, 10 A. & E. 19; 2 Per. & Dav. 285, S. C. See the provisions of the Common Law Procedure Act, 15 & 16 Vict. c. 76, s. 52.

(*v*) See ante, p. 386.

in the amount of that bill the interest and necessary expenses of the transaction. This cross bill is called in French the *retraite*. The amount for which it is drawn is called in low Latin *ricambium*, in Italian *ricambio*, and in French and English re-exchange. If the indorser pay the cross or re-exchange bill, he has fulfilled his engagement of indemnity. If not, the holder of the original bill may sue him on it, and will be entitled to recover in that action the amount of the *retraite* or cross bill, with the interest and expenses thereon. The amount of the verdict will thus be an exact indemnity for the non-payment of the Austrian florins in Vienna on the day of the maturity of the original bill.

According to English practice, the *retraite* or re-exchange bill is now seldom drawn, but the right of the holder to draw it is settled by the law merchant of all nations, and it is only by a reference to this supposed bill that the re-exchange, in other words, the true damages in an action on the original bill, can be scientifically understood and computed.

It is plain that whether the indorser gain or lose by the re-exchange depends, (except in so far as relates to the expenses,) on the rate of exchange between the two countries. If the value of the Austrian florin, measured in pounds sterling, has risen, the holder will be entitled to recover more than the original amount of the bill in English money (*x*). But if the value of the Austrian florin has declined, then the indorser may not be liable to repay as much English money as the bill was originally drawn for, unless the interest and expenses cover or exceed the difference (*y*).

A custom among London merchants that the holder may at his election sue his indorser, either for the sum which the indorser received of him for the bill, or for the re-exchange, is inconsistent with the obligation appearing on the bill when interpreted by the law merchant, and therefore evidence of such a custom is inadmissible (*z*).

The drawer of a bill is liable to the re-exchange, though the bill be returned through never so many hands (*a*). But the acceptor is not liable to the re-exchange (*b*).

Other damages not necessarily arising from the dishonour, as noting, postages, &c., are not recoverable unless

Other damages.

telegraphic messages

(*x*) *De Tastet* v. *Baring*, 11 East, 265; 2 Camp. 65, S. C.

(*y*) *Suse* v. *Pompe*, 30 L. J., C. P. 75; 8 C. B., N. S. 538, S. C.

(*z*) Ibid.

(*a*) *Mellish* v. *Simeon*, 2 H. Bl. 378.

(*b*) *Napier* v. *Schneider*, 12 East, 420; *Woolsey* v *Crawford*, 2 Camp. 445.

CHAPTER XXXIII.

specially stated in the declaration (*c*). But it has been held that postage is in some cases recoverable under the count for money paid (*d*).

Advantage of suing on the bill rather than on the consideration.

When a bill is dishonoured, the owner has his option to sue on the bill, or on the consideration. It is advisable to sue on the bill; first, because it reduces the debt to a certainty; secondly, because less evidence is necessary; thirdly, in an action on the bill, proof of payment of the bill lies on the defendant; but in an action on the consideration only, if defendant show that a bill was given, plaintiff must prove that the bill was *not* paid (*e*).

Of course it is best, where possible, to join a count on the bill with a count on the consideration (*f*); and the plaintiff may take a verdict on both counts (*g*).

Interposition of equity.

It would be foreign to the object of this little work to discuss, at length, the jurisdiction and proceedings of Courts of equity in relation to actions on bills. The following general observations may nevertheless be made.

To restrain action.

A Court of equity, where the rules of judicial equity require, will restrain an action on a bill, or restrain the defendant in an action from availing himself of a legal defence (*h*).

And where the defendant in an action would, if judgment were obtained, be entitled to relief against such judgment on equitable grounds, he may now plead the facts which entitle him to such relief by way of defence (*i*). Such a plea is only allowed where final justice can be done by the Court

(*c*) *Kendrick* v. *Lomax*, 2 C. & J. 405; 2 Tyr. 438, S. C. In which case it was held, that the bill having been renewed, the plaintiff could not recover the charges on the first bill while the second bill suspended the remedy on it. It seems doubtful whether the expense of noting an inland bill, not protested, can at common law in any case be recovered. Ibid. But see the Bills of Exchange Act, 18 & 19 Vict. c. 67, s. 5. See also *Rogers* v. *Hunt*, 10 Exch. 474.

(*d*) *Dickinson* v. *Hatfield*, 1 M. & Rob. 141; 5 Car. & P. 46. The defendant in this case directed the plaintiff to charge him with it. See the Chapter on PROTEST. As to nominal damages, see *Beaumont* v. *Greathead*, 2 C. B. 495.

(*e*) *Hebden* v. *Hartsink*, 4 Esp. 46; *Bishop* v. *Rowe*, 3 M. & Sel. 362.

(*f*) A count on the consideration may still be joined, R. H. T. 1858. And a count on an account stated in all cases.

(*g*) *Vide* ante.

(*h*) See *Queen of Portugal* v. *Glynn*, 1 West. 258; *Glynn* v. *Soares*, 3 M. & K. 450; *Hodgson* v. *Murray*, 2 Sim. 515; *Hood* v. *Ashton*, 1 Russ. 412; *Kidson* v. *Dilworth*, 5 Price, 564; *Druiff* v. *Lord Parker*, 37 L. J., Chan. 241; *Prothero* v. *Phelps*, 25 L. J., Chan. 105; *Agra and Masterman's Bank* v. *Hoffman*, 34 L. J., Chan. 285.

(*i*) 17 & 18 Vict. c. 125, s. 84.

of law in the pending suit (*k*). And a defendant having pleaded it, is not precluded from afterwards resorting to a Court of equity (*l*).

Discovery in aid of action or defence.

A Plaintiff may, where it is necessary, file a bill of discovery in aid of an action on a bill, or of an action relating to the proceeds of bills (*m*). But now this will seldom, if ever, be necessary, as in all causes in any of the superior Courts a plaintiff may interrogate the defendant on oath, upon any matter as to which discovery may be sought (*n*).

If the defendant in equity be interrogated as to the consideration for the bill, he must answer not only as to the consideration given by himself, but as to that given by other parties to his knowledge (*o*). No bill can be filed for discovery, if it charge the defendant with a crime (*p*).

But the former Gaming Act, 9 Anne, c. 14, s. 3 (*q*), and the Stock Jobbing Act, 7 Geo. 2, c. 8, s. 2, deprive defendants of this protection in matters to which those Acts related (*r*).

(*k*) *Wodehouse* v. *Farebrother*, 25 L. J., Q. B. 18; 5 E. & B. 277, S. C.; *Wood* v. *Copper Miners' Company*, 17 C. B. 561; *Clarke* v. *Laurie*, 26 L. J., Exch. 88; *Drain* v. *Harvey*, 17 C. B. 257; but see *Chilton* v. *Carrington*, 24 L. J., C. P. 153.

(*l*) *Evans* v. *Bremridge*, 2 Jur. New Series, 134; 25 L. J., Chan. 334, S. C.; *Prothero* v. *Phelps*, 25 L. J., Chan. 105. But see *Torrell* v. *Higgs*, 26 L. J., Ch. 837.

(*m*) See *Thomas* v. *Taylor*, 3 Y. & C. 255; *Wilkinson* v. *Leaugier*, 2 You. & C. 366; or of a defence to an action.

(*n*) 17 & 18 Vict. c. 125, s. 51. See *Whateley* v. *Crowter*, 5 E. & B. 709.

(*o*) *Glengall* v. *Edwards*, 2 You. & Col. 125; and see *Culverhouse* v. *Alexander*, 2 You. & Col. 218.

(*p*) *Fleming* v. *St. John*, 2 Sim. 181; *Whitmore* v. *Francis*, 8 Price, 616; 2 Sim. 182. But it has been held by the Court of Common Pleas that questions tending to criminate may be put, though they need not be answered E. T. 1862, *sed quære*.

(*q*) Now repealed by 8 & 9 Vict. c. 109.

(*r*) See *Wilkinson* v. *Leaugier*, 2 You. & Col. 366; *Bullock* v. *Richardson*, 14 Vesey, 378; *Rawlings* v. *Hall*, 1 C. & P. 11; *Thomas* v. *Newton*, 2 C. & P. 606.

I have run through with Pencil some things that may be omitted in new edition.

CHAPTER XXXIV.

OF THE PLEADINGS IN ACTIONS ON BILLS AND NOTES.

~~Old Forms of Action~~ . 417
~~Debt~~ 417
~~Assumpsit~~ . . . 418
~~Declaration~~ . . . 418
Statement of the Parties to the Instrument . . 418
Of Christian Name by Initials 419
Description of Instrument . 419
Statement of Acceptance . 420
Of Presentment for Payment 420
Of Notice of Dishonour . 420
Of Excuse for omitting to present for Payment, &c. 420
Of Notice of Indorsement . 421
Of Protest . . . 421
Of Maturity of Instrument 421
~~*Allegation of Promise to pay*~~ 422
Declaration on a Bill drawn in Sets 423
Assignment of the Breach . 423
Damages 423
Pleas 423
General Effect of New Rule 423
Non Assumpsit . . . 423
~~*Nil Debet*~~ . . . . ~~424~~
General Issue by Statute . 424
Traverse of Acceptance . 424
Traverse of Indorsement . 424
Absence of Consideration . 425
That Plaintiff is not the Holder 426
Plea of Payment . . 426
Effect of Pleading over . 426
Fraud 426
Payment 427
Satisfaction . . . 427
Duplicity of Pleas under the old Law . . . 427
Sham and Ensnaring Pleas 428
Replication de Injuria superseded . . . 429
Replication to Plea denying Consideration . . 429
Pleading an Estoppel . 430
Distributive Replication . 430

CHAPTER XXXIV.

To enter on the subject of pleading and evidence in detail would be foreign to the objects of this work. Many points both of pleading and evidence, have already been discussed in the foregoing Chapters. And the decisions, on the law of pleading in actions on bills of exchange, since the new Rules and the Common Law Procedure Act, have not been sufficiently numerous to remove every obscurity from that branch of the law. These considerations may, perhaps, bespeak the candour of the reader for the deficiencies of the present and the next Chapter.

Two forms of action in the superior Courts were formerly brought on a bill or note, *debt* and *assumpsit* (*a*).

DEBT.

But *debt* is at common law of limited application, and will only lie where there is a privity of contract between the parties (*b*). It will, therefore, lie at the suit of the drawer against the acceptor (*c*); by the payee against the drawer of a bill or check (*d*), or maker of a note (*e*); by first indorsee against the drawer of a bill payable to his own order (*f*); and in all cases by indorsee against his immediate indorser (*g*). It has been doubted whether an action of debt may not, at the common law, be maintained by the payee against the acceptor, though the payee be not the drawer (*h*); but it is conceived that no one but the drawer of a bill payable to his own order could have sued the acceptor in debt (*i*).

On a promissory note payable by instalments, debt will not lie till the last day of payment be past (*j*); because the different instalments are considered to constitute but one debt, and for one debt the plaintiff can bring but one action of debt, and cannot split his demand, and vex the debtor with a multitude of suits (*k*).

(*a*) These observations were written before the Common Law Procedure Act; but at present some of them are still material, at least, as showing the law on which the alterations are engrafted.

(*b*) *Lewin* v. *Edwards*, 9 M. & W. 720.

(*c*) *Priddy* v. *Henbrey*, 1 B. & C. 674: 3 Dowl. & R. 165.

(*d*) *Simpkins* v. *Potecary*, 19 L. J., Exch. 242; 5 Exch. S. C.

(*e*) *Bishop* v. *Young*, 2 B. & P. 78; *Hodges* v. *Steward*, Skin. 346; 12 Mod. 36; 1 Salk. 225, S. C.

(*f*) *Stratton* v. *Hill*, 3 Price, 253.

(*g*) *Watkins* v. *Wake*, 7 M. & W. 490; see *Hodges* v. *Steward*, Skin. 346.

(*h*) See a learned note to Chitty on Bills, 9th ed. p. 690.

(*i*) *Bishop* v. *Young*, 2 B. & P. 78; *Cloves* v. *Williams*, 3 Bing., N. C. 868; 5 Scott, 68, S. C.; *Powell* v. *Ancell*, 3 M. & G. 171. And it was once supposed that it would not lie unless the words "*value received*," or some expression of the consideration appeared on the face of the instrument. *Bishop* v. *Young*, 2 B. & P. 78; *Priddy* v. *Henbrey*, 1 B. & C. 674; 3 Dowl. & R. 165, S. C.; *Cresswell* v. *Crisp*, 2 Dowl. P. C. 635; 2 C. & M. 634, S. C. But it is now clear that debt will lie, though the words "value received" be not on the face of the bill. *Hatch* v. *Trayes*, and *Watson* v. *Kightley*, 11 Ad. & E. 702; 3 Per. & D. 408, S. C.

(*j*) *Rudder* v. *Price*, 1 H. Bl. 547.

(*k*) *Baylye* v. *Hughes*, Cro. Car. 137; *Pemberton* v. *Shelton*, Cro. Jac. 498; *Hunt* v. *Braines*, 4 Mod. 402; *Hulme* v. *Sanders*, 10 Mod. 69; 2 Lev. 4; 1 Wms. Saund. 201, *a*; *Clun's case*, 10 Rep. 127. But if a note be payable by instalments on the face of it, an action of ASSUMPSIT lies for each instalment. If, however, the note is payable by instalments *but not on the face of it*, only one action of *assumpsit* lies; and though in such a case a cognovit

The distinction between the old forms of action debt & assumpsit has been practically abolished by the C.L.P.A.

CHAPTER XXXIV.

To compensate for these disadvantages, the action of *debt* had some recommendations; and, in the first place, the judgment in the first instance was not interlocutory, but final, so that, after judgment by default, the plaintiff need not execute a writ of inquiry, or refer to the Master, to compute principal and interest. Secondly, the Court could not, in any case, dispense with bail, if a writ of error were brought.

The forms of declarations given by the Judges are applicable in debt as well as in assumpsit.

ASSUMPSIT.

The action of *assumpsit*, on account of its universal applicability, was by far the most usual remedy on a bill or note.

Most of the following observations were applicable alike to the action of debt, and to the action of *assumpsit*.

And now, by the Common Law Procedure Act, the distinction between forms of action is practically abolished.

DECLARATION.

It will be convenient to exhibit the decisions on points of pleading, in the order indicated by the several stages of the pleadings. First, therefore, of the declaration.

Statement of the parties to the instrument.

It was formerly usual to state that the parties to a bill were merchants, or persons engaged in commerce, and that the bill was drawn according to the custom of merchants. But such a statement, and, indeed, any reference whatever to the custom of merchants, which custom is parcel of the common law of the land, is unnecessary, and is now disused.

In an action against the acceptor on a bill drawn by a firm, it is a sufficient description of the drawers to say that certain persons under the name, style and firm of A. & C., made their bill of exchange (*l*). A declaration stating that A. B. drew a bill requiring defendant to pay to the drawer's order without again naming him, is good (*m*), or to his order, the word *his* referring to the drawer (*n*).

be taken for the amount of the first instalment only, the note is discharged. *Siddall* v. *Rawcliffe* 1 C. & M. 487; 1 M. & Rob. 268, S. C. Wager of law is now abolished (3 & 4 Will. 4, c. 42, s. 13), and debt on simple contract now lies against an executor or administrator (3 & 4 Will. 4, c. 42, s. 14).

(*l*) *Tigar* v. *Gordon*, 9 M. & W. 347. It has been held insufficient to describe the drawers as certain persons using the name, &c. *Ball* v. *Gordon*, 9 M. & W. 345; *sed quære*, see *Smith* v. *Ball*, 9 Q. B. 361, and *Bass* v. *Clive*, 4 Camp. 78; 4 M. & Sel. 13, S. C.; *Schultz* v. *Astley*, 7 C. & P. 99; 2 Bing. N. C. 544, S. C.; 2 Scott, 815.

(*m*) *Knill* v. *Stockdale*, 6 M. & W. 478.

(*n*) *Spyer* v. *Thelwell*, 2 C., M. & R. 692; 4 Dowl. 509, S. C.

Of christian name by initials.

In all actions on bills or notes, where any of the parties are designated on the instrument by the initial letter, or some contraction of the christian name, it is sufficient so to describe them in the process and declaration (*o*). ~~A single letter, where it is a vowel, may, on special demurrer, be assumed to be a christian name (*p*); but not if a consonant (*q*).~~

In a declaration by the public officer of a banking co-partnership, established under the 7 Geo. 4, c. 46, it is sufficient to describe the plaintiff as a public officer duly appointed (*r*).

Description of the instrument.

The instrument may be described, either by setting it out *in hæc verba* (*s*), or by stating its legal effect. If it be drawn in a foreign language, it may be set out in English (*t*). It ~~is neither necessary nor safe~~ to aver that the instrument bore date on a certain day; for such an averment, if incorrect, being matter of description, would be a variance (*u*). ~~The safe and usual mode of declaring is, to allege that A. B. on such a day made his bill; for the day alleged not then being part of the description of the instrument, a making on any day may be proved.~~ Since, however, the recent statutes of amendment, this precaution has become less important. Whether the bill be stated with or without a date, it should be alleged that the bill is overdue. An allegation that it is *now* overdue, means that it was overdue, not merely at the date of the declaration, but at the issuing of the writ (*x*). If the bill were not due at the time of action brought, the

(*o*) 3 & 4 Will. 4, c. 42, s. 12. But it must appear on the count that they are so described in the instrument itself; *Levy* v. *Webb*, 9 Q. B. 427, 442; *Gatty* v. *Field*, Ibid.; *Esdaile* v. *M'Clean*, 15 M. & W. 277, or the declaration was specially demurrable; *Miller* v. *Hay*, 3 Exch. 14; *Turner* v. *Fitt*, 3 C. B. 701; unless the full christian name could not be discovered: *Lomax* v. *Landells*, 6 C. B. 583. But special demurrers being abolished by the C. L. P. Act, 1852, it is no longer necessary.

(*p*) *Lomax* v. *Landells*, 18 L. J., C. P. 88; 6 C. B. 583, S. C.

(*q*) *Kinnersley* v. *Knott*, 7 C. B. 980.

(*r*) *Spiller* v. *Johnson*, 6 M. & W. 570; *Christie* v. *Peart*, 7 M. & W. 491.

(*s*) Except in cases where that would mislead, as where a bill is drawn payable in a foreign currency of the English denomination, but of a different value. *Kearney* v. *King*, 2 B. & Ald. 301; *Sprowle* v. *Legge*, 1 B. & C. 16; 2 D. & Ry. 15, S. C.; see *Taylor* v. *Booth*, 1 C. & P. 286; *Harrington* v. *M'Morris*, 5 Taunt. 228; 1 Marsh. 33, S. C.; *Simmonds* v. *Parminter*, 1 Wils. 185; 4 Bro. P. C. 604; *Stevenson* v. *Oliver*, 8 M. & W. 234.

(*t*) *Attorney-General* v. *Valabreque*, Wightw. 9.

(*u*) Anon., 2 Camp. 308, n.

(*x*) *Owen* v. *Waters*, 2 M. & W. 91.

as to pleading acceptance, presentment &c. the reader is referred to the Chapters on those subjects.

CHAPTER XXXIV.

objection may be raised under the ordinary traverses of the acceptance, drawing or indorsement (*y*).

In a declaration on a joint and several promissory note, it is not improper to state, that the makers, jointly or separately, promised to pay (*z*). When a bill is made payable at usance, the length of the usance must be stated (*a*). Where an instrument has been made payable to husband and wife, and the husband sues upon it alone, it may be stated in the declaration to have been made payable to the husband (*b*).

A bill drawn upon A., B. and C. may be described as drawn on A. and B. (*c*).

Statement of acceptance.

For the proper mode of stating the acceptance of a bill of exchange in pleading, the reader is referred to the Chapter on ACCEPTANCE.

Statement of presentment for payment. Of notice of dishonour.

For the proper mode of pleading a presentment for payment, the reader is referred to the Chapter on that subject.

The omission to state notice of dishonour is not cured by verdict (*d*).

Statement of excuse for omitting to present for payment or acceptance, or to give notice of dishonour.

It was formerly considered doubtful (*e*) whether such facts as dispense with presentment, protest or notice of dishonour, could, or could not, be given in evidence in support of the common allegations of presentment, protest or notice in the declaration. It is now, however, clear, that facts dispensing with presentment or notice, such as absence of effects in the drawee's hands, or a countermand of payment by the drawer, must be specially alleged in the declaration; and that proof of those facts is inadequate to the support of a positive averment of presentment, protest, or notice (*f*). A promise to pay, however, is still admissible under the

(*y*) *Hinton* v. *Duff*, 31 L. J., C. P. 199; 11 C. B., N. S. 724, S. C.

(*z*) *Rees* v. *Abbott*, Cowp. 832; *Butler* v. *Malisy*, 1 Stra. 76; and see *Neale* v. *Ovington*, 2 Ld. Raym. 1544.

(*a*) *Buckley* v. *Campbell*, 1 Salk. 131; *Meggadow* v. *Holt*, 12 Mod. 15; 1 Show. 317, S. C.

(*b*) *Ankerstein* v. *Clarke*, 4 T. R. 616.

(*c*) *Evans* v. *Lewis*, 1 Wms. Saund. 291, d; *Mountstephen* v. *Brooke*, 1 B. & Ald. 224; see *Wilson* v. *Reddall*, Gow. 161.

(*d*) *Rushton* v. *Aspinall*, Doug. 654.

(*e*) *Cory* v. *Scott*, 3 B. & Ald. 619; Bayley on Bills, 5th ed. 406.

(*f*) *Burgh* v. *Legge*, 5 M. & W. 418; see *Terry* v. *Parker*, 6 Ad. & E. 502; 1 N. & P. 752, S. C.; *Carter* v. *Flower*, 16 M. & W. 749. But the power of amendment in such cases is liberally exercised. *Cordery* v. *Colville*, 32 L. J., C. P. 210; 14 C. B., N. S. 724.

common averments as *primâ facie* evidence, that the preliminaries essential to the maintenance of the action, such as presentment and notice, have been satisfied (*g*). But if it should distinctly appear in evidence that there has been a neglect to present, and that the defendant, being aware of the omission, afterwards promised to pay, so that the promise is used as a waiver, it is conceived that the declaration must still be special. It may be otherwise, where there has been a neglect to give notice of dishonour in due time, and a promise to pay, with notice of the omission, has been afterwards made before action brought, for then the defendant has, in the words of the declaration, had notice of the dishonour, which notice, under the circumstances, may be deemed as against him due notice. But the law on this subject does not appear to be very clearly settled (*h*). It seems, however, that notice, too late in the usual course, but reasonable and sufficient under the special circumstances, may be proved under the ordinary allegation (*i*).

Statement of notice of indorsement.

It is not necessary to allege a notice to the defendant of the indorsement on a bill or note, and if the declaration contain such a statement, it cannot be traversed (*k*).

Statement of protest.

As to the mode of pleading a protest, see the former Chapter on PROTEST AND NOTING.

Statement of the maturity of the instrument.

~~The forms of declarations on bills of exchange, propounded by the Judges, having~~ been ~~originally settled before the passing of the Uniformity~~ of Process Act, the 2 Will. 4, c. 39, are not now in all cases strictly correct. ~~Before that Act, the plaintiff had a right to treat the declaration as the commencement of the action~~; but now the writ is for all purposes the commencement. The declaration, therefore, instead of alleging that the period for which the bill is drawn hath *now* elapsed, ought at least to allege that it had elapsed at the commencement of the suit (*l*). No notice

(*g*) See *Hopley* v. *Dufresne*, 15 East, 275; *Lundie* v. *Robertson*, 7 East, 231; 3 Smith, 225, S. C.; *Hicks* v. *Duke of Beaufort*, 4 Bing. N. C. 229; 5 Scott, 593, S. C.; *Metcalfe* v. *Richardson*, 11 C. B. 1011. See the Chapter on PRESENTMENT FOR PAYMENT.

(*h*) See *Brownell* v. *Bonney*, 1 Q. B. 39; 3 M. & Ry. 359; Dans. & L. 151, S. C.; *Firth* v. *Thrush*, 8 B. & C. 387; *Baldwin* v. *Richardson*, 1 B. & C. 245; 2 D. & Ry. 285, S. C., ante.

(*i*) *Carter* v. *Flower*, 16 M. & W. 749.

(*k*) *Bradbury* v. *Emans*, 5 M. & W. 595; 7 Dowl. 849, S. C.; *Reynolds* v. *Davies*, 1 B. & P. 625.

(*l*) *Abbott* v. *Aslett*, 1 M. & W. 209; 1 Tyr. & G. 448; 4 Dowl. 759, S. C.; but see *Owen* v. *Waters*, 2 M. & W. 91; 5 Dowl. 324, S. C. And *strictissimo iure* perhaps

CHAPTER XXXIV.

need be taken of the days of grace (*m*). In the form given by the Common Law Procedure Act, 1852, the words are "*now* overdue," and they are by a strained construction held to mean at the issuing of the writ. They are part of the description of the bill, and are, therefore, put in issue by a traverse of the acceptance (*n*).

Allegation of a promise to pay.

It was thought, before the recent rules and statute, that it was not absolutely necessary, even in an action of assumpsit by the indorsee against the indorser, to allege in the declaration a promise to pay by the defendant. "The drawing of a bill," says Lord Holt, "is an actual promise" (*o*). But the omission of a promise was ground of special demurrer (*p*). For otherwise, in a count on a bill of exchange, there would have been nothing to distinguish an action of assumpsit from an action of debt. A declaration on a promissory note to pay at a certain date, was not double for setting out another promise, after the note is due, to pay on request (*q*).

A promise to pay, made after the bill is due, should not, in strictness, have been laid as a promise to pay according to the tenor and effect of the bill, but as a promise to pay on request. A promise, however, to pay an overdue bill according to its tenor and effect, was good even on special demurrer (*r*). An allegation that the defendant promised to pay the plaintiff, or promised the plaintiff to pay, according to the tenor, &c., were either of them sufficient, and amounted to an allegation of a promise to the plaintiff to pay him (*s*).

even the latter form is not accurate unless it appear from the whole declaration that the bill is due, or unless the period referred to may be considered as including the days of grace. But see *Padwick* v. *Turner*, infra. Where the date when the bill will fall due is laid, but not under a *videlicet*, the mere date has been held sufficient if, by comparison with the date of the writ appearing on record, the action appears not to be premature. *Shepherd* v. *Shepherd*, 1 C. B. 849.

(*m*) *Padwick* v. *Turner*, 11 Q. B. 124.

(*n*) *Hinton* v. *Duff*, 11 C. B., N. S. 724.

(*o*) *Starke* v. *Cheeseman*, 1 Salk. 128; Carthew, 509; 1 Ld. Raym. 538; *Wegersloffe* v. *Keene*, 1 Stra. 214; *Buckler* v. *Angel*, 1 Sid. 246.

(*p*) *Griffith* v. *Roxburgh*, 6 Dowl. 133; *Henry* v. *Burbidge*, 3 Bing. N. C. 501; 4 Scott, 296; 5 Dowl. 484, S. C.; see *Donaldson* v. *Thompson*, 6 M. & W. 316; *Christie* v. *Peart*, 7 M. & W. 491; Bayley, 6th ed.; *Stericker* v. *Barker*, 9 M. & W. 321; *Smith* v. *Cox*, 12 L. J., Exch. 307; 11 M. & W. 475, S. C.

(*q*) *Shepherd* v. *Shepherd*, 1 C. B. 849; 3 D. & L. 199, S. C.

(*r*) *Christie* v. *Peart*, 7 M. & W. 491; see *Hunt* v. *Massey*, 5 B. & Ad. 902; 3 Nev. & M. 109; S. C.; *Jackson* v. *Pigott*, 1 Ld. Raym. 364; see *Price* v. *Easton*, 4 B. & Ad. 433; 1 Nev. & M. 303.

(*s*) *Bancks* v. *Camp*, 9 Bing. 604; 2 M. & Scott, 734, S. C.; *Schild* v. *Kilpin*, 8 M. & W. 673.

As to the declaration in an action on a set of bills, see the Chapter on SETS OF BILLS.

Declaration on a bill drawn in sets.

The breach by non-payment may be assigned, either in the count on the bill, or at the conclusion of the money counts (*t*).

Assignment of the breach.

It is not necessary to add a count for interest, or to claim interest as special damage. It is recoverable as part of the ordinary and necessary damage resulting from non-payment.

Damages.

As to other and special damage, see the Chapter on the remedy by ACTION ON A BILL.

R. 2. H. T. 1853.

The ~~New Rules of Court~~ (*u*) direct that in all actions upon bills of exchange and promissory notes, the plea of non assumpsit, or never indebted, shall be inadmissible (*x*). In such actions, therefore, a plea in denial must traverse some matter of fact; *ex. gr.* the drawing, or making, or indorsing, or accepting, or presenting, or notice of dishonour of the bill or note; and all matters in confession and avoidance must be specially pleaded, including not only those by way of discharge, but those which show the transaction to be either void or voidable in point of law, on the ground of fraud or otherwise, *ex. gr.* infancy, coverture, release, payment, performance, illegality of consideration, either by statute or common law, drawing, indorsing, accepting, &c., bills or notes by way of accommodation, set-off, mutual credit, and various other defences (*y*).

PLEAS.

General effect of new rule.

Therefore, since these rules, if the plea of non assumpsit be pleaded in action on a bill or note, the plaintiff may sign judgment (*z*). But if the promise laid is not the promise implied by law, the general issue may be pleaded. Thus, if

Non Assumpsit.

(*t*) See *Benson* v. *White*, 4 Dowl. 334; *Turner* v. *Denman*, 4 Tyrw. 313.

(*u*) H. T., 16 Vict. 1853, rule 7.

(*x*) It is nevertheless admissible, in cases where a promise is stated, which would not be the necessary legal effect of the bill or note. As, for example, where a promise by or to an executor is alleged. See *Rolleston* v. *Dixon*, 14 L. J., Exch. 304, post; 2 D. & L. 892, S. C.

(*y*) Equitable defences may now be pleaded, 17 & 18 Vict. c. 125, ss. 83, 85.

(*z*) *Kelly* v. *Villebois*, 8 Dowl. 136; *Sewell* v. *Dale*, 8 Dowl. 309. Perhaps a *nolle prosequi* should be entered on the common counts. *Fraser* v. *Newton*, 8 Dowl. 773. The plaintiff cannot, where the plea is also pleaded to the common counts, treat it as a nullity. *Eddison* v. *Pigram*, 16 M. & W. 137; and *Grout* v. *Enthoven*, 1 Exch. 382. It has been held, that the plea of non assumpsit admits the handwriting. *Neale* v. *Proctor*, 2 Car. & K. 456.

CHAPTER XXXIV.

an executor declare on a bill or note payable to his testator laying a promise to himself (the executor), such promise may still be denied by a plea of non assumpsit (*a*).

Nil debet.

Although the New Rules have abolished the plea of *nil debet*, it has been held, that if, to a declaration in debt against the acceptor of a bill of exchange, the defendant pleads payment into court of part, and that he is not indebted beyond that sum, and the plaintiff join issue and proceed to trial, it is competent for the defendant to make, under this plea, any defence applicable to the plea of *nil debet*, notwithstanding that the plea would formerly have been bad on special demurrer (*b*).

General issue by statute.

The general issue by statute may be pleaded to an action on a bill or note (*c*).

Traverse of acceptance.

In an action against partners, on their acceptance to a bill of exchange, a plea stating facts, from which it appears that both partners are not bound, was formerly bad on special demurrer as amounting to an argumentative denial of the acceptance. The proper plea has been held by the Court of Queen's Bench to be a traverse of the acceptance (*d*).

Traverse of indorsement.

The indorser of a note is not a new maker or drawer as the indorser of a bill is. Therefore, where, in an action by indorsee against indorser, the plaintiff declared against the defendant as maker: it was held that the indorsee of a note could not declare against his indorser as maker, even where the latter has indorsed a note not payable or indorsed to him, and where, consequently, his indorsee cannot sue the maker, and that under a plea denying the making of the note, the defendant was entitled to a verdict (*e*). But in the case of a bill of exchange it is otherwise. In an action by indorsee against indorser of a bill, the defendant pleaded that "he did not *make* or *draw* the bill of exchange, as in

(*a*) *Timmis* v. *Platt*, 2 M. & W. 720; 5 Dowl. 748, S. C., nom. *Gilbert* v. *Platt;* but see *Donaldson* v. *Thompson*, 6 M. & W. 316.

(*b*) *Finleyson* v. *Mackenzie*, 3 Bing. N. C. 824; 6 Dowl. P. C. 71; 5 Scott, 20, S. C.

(*c*) *Weeks* v. *Argent*, 17 L. J., Exch. 209; 16 M. & W. 817, S. C.

(*d*) *Jones* v. *Corbett*, 11 L. J., Q. B. 181; 2 Q. B. 828, S. C.; and see *Musgrave* v. *Drake*, 5 Q. B. 185; see ante, p. 47, and the observations of Mr. Justice Willes on this case in *Hogg* v. *Skein*, 34 L. J., C. P. 153.

(*e*) *Gwinnel* v. *Herbert*, 5 Ad. & Ell. 436; 6 N. & M. 723, S. C., ante.

the declaration alleged;" although the plea was bad in form, it was held good in substance, as every indorser of a bill is in law a new drawer, and the plaintiff was not allowed to treat the plea as a nullity, and sign judgment (*f*).

Its effect.

A plea denying the indorsement of a bill of exchange puts in issue, as we have seen, not only the signature, but also such a delivery and transfer as will constitute the indorser a holder (*g*). And *facts* tending to show that no interest passed to the indorsee may with propriety be specially pleaded, for they will not amount to an argumentative traverse of the indorsement (*h*). It seems that when a distant indorsee is plaintiff, an intermediate indorsement may be such in legal effect, though it would not be such if the immediate indorsee were plaintiff (*i*).

Absence of consideration.

A plea simply averring absence of consideration is improper. It should state affirmatively the circumstances relating to the consideration (*k*); and distinctly deny that there was any consideration other than that alleged (*l*). But it is good after verdict (*m*). If the informal plea of no consideration is traversed, the affirmative still lies on the defendant as it would have done had he pleaded properly (*n*). Where the defendant pleaded that there was no consideration, and issue was taken thereon, it was held that the defendant was at liberty to show that the contract which would otherwise have constituted the consideration, was avoided by fraud (*o*). If a plea state the circumstances under which the bill or note was given, and add that there was no consideration, a

(*f*) *Allen* v. *Walker*, 2 M. & W. 317; 5 Dowl. P. C. 460; 1 M. & Hurl. 44, S. C.

(*g*) *Marston* v. *Allen*, 1 Dowl. N. S. 442; 8 M. & W. 491, S. C.; *Bell* v. *Ingestre*, 12 Q. B. 317; *Lloyd* v. *Howard*, 15 Q. B. 995.

(*h*) *Harmer* v. *Steele*, 4 Exch. 1, reversing the decision of the Court of Exchequer in *Steele* v. *Harmer*, 15 L. J., Exch. 217, and 14 M. & W. 831, S. C.

(*i*) *Hayes* v. *Caulfield*, 5 Q. B. 81.

(*k*) *Easton* v. *Pratchett*, 1 C., M. & R. 798; 3 Dowl. 472; 1 Gale, 33, S. C.; *Stoughton* v. *Earl of Kilmorey*, 2 C., M. & R. 72; 3 Dowl. 705; 1 Gale, 91, S. C.; *Graham* v. *Pitman*, 5 Nev. & Man. 37; 3 Ad. & Ell. 521, S. C.; *Trinder* v. *Smedley*, 3 Ad. & E. 522; 5 N. & M. 138, S. C.

(*l*) *Boden* v. *Wright*, 12 C. B. 445.

(*m*) *Easton* v. *Pratchett*, in error, 2 C., M. & R. 542; and see *Kemble* v. *Mills*, 1 M. & Gr. 757; 5 Scott, 121, S. C.; *Crofts* v. *Beale*, 11 C. B. 172.

(*n*) *Lacey* v. *Forrester*, 2 C., M. & R. 59; 3 Dowl. 668; 1 Gale, 139, S. C.

(*o*) *Mills* v. *Oddy*, 2 C., M. & R. 103; 3 Dowl. 722; 6 C. & P. 728, S. C.; *Southall* v. *Rigg*, 11 C. B. 481; *Forman* v. *Wright*, ibid.

CHAPTER XXXIV.

traverse of the first averment is sufficient, without a traverse of the last (*p*).

That plaintiff is not the holder.

The defendant may plead, that before the action the plaintiff transferred the bill, and, therefore, that he is not the holder (*q*). But a plea that the plaintiff is not the lawful holder has in some cases at chambers been considered too general, and in other cases particulars have been ordered.

Plea of payment or satisfaction by a bill.

As to the mode of pleading payment by bill or note, see the Chapter on the question how far a bill or note is considered as payment.

Effect of pleading over.

After pleading over, every ambiguous pleading must have such an interpretation as will make it good rather than bad (*r*); for, by pleading over, the adverse party admits that he has understood it in a sense which requires an answer.

A plaintiff is not entitled to judgment *non obstante veredicto*, nor a defendant to arrest the judgment for insufficient pleading, if that pleading merely leave a material allegation untraversed. The proper course is to award a repleader, unless there be an express confession of the material part of the former pleading, or an implied confession by pleading in confession and avoidance (*s*).

FRAUD.

Where the plaintiff's title is to be impeached by notice of fraud, notice must be expressly averred. Indorsee *v.* drawer of a bill of exchange.—Plea, that the bill had been drawn and indorsed to L. for a specific purpose, who in fraud of that purpose had handed it to H., and that H. handed it to plaintiff, not for good and valuable consideration, and that the plaintiff was not a *bonâ fide holder*:—Held, that the last allegation, connected with the rest of the plea, meant only that the plaintiff had not given good consideration for the bill, and that fraud in the plaintiff could not be given in evidence under it; and the Court intimated, that it was their opinion, that the only proper mode of implicating the plaintiff in the alleged fraud by pleading, is to aver "that he had

(*p*) *Atkinson* v. *Davies*, 11 M. & W. 236.

(*q*) *Basan* v. *Arnold*, 6 M. & W. 559; *Fraser* v. *Welch*, 8 M. & W. 630; *Arthur* v. *Beales*, 1 Exch. 608. As to the proper mode of replying to such a plea, see *Barber* v. *Lemon*, 11 Q. B. 302; 17 L. J., Q. B. 69, S. C.; *Rogers* v. *Chilton*, 17 L. J., Exch. 8, 345; 1 Exch. 862, S. C.

(*r*) *James* v. *Williams*, 13 M. & W. 828.

(*s*) *Gwynn* v. *Burnell*, 6 Bing. N. C. 453, Dom. Proc.; *Atkinson* v. *Davies*, 11 M. & W. 242.

notice of it," leaving the circumstances by which that notice is to be proved, directly or indirectly, to be established in evidence, and that they could not treat the allegation that the plaintiff was not a *bonâ fide* holder as equivalent to such an averment (*t*).

A plea that defendant's agent fraudulently disposed of the bill, of which fact the plaintiff had notice, has been held bad, unless it go on to deny the receipt of any value by the defendant (*u*).

Payment.

Until recently payment might, in the action of assumpsit, have been given in evidence in reduction of damages. But not in an action of debt (*x*). It must now in all cases be pleaded (*y*), although the payment be of interest only (*z*). If the plaintiff in his declaration gives credit for part payment, the allegation of part payment is not traversable (*a*). A plea of payment must be supported by proof of actual payment in money (*b*); but where a bill has been given in satisfaction of another bill and ultimately paid, in an action on the first bill it will be sufficient to plead payment (*c*).

Satisfaction.

Where a plea alleges the satisfaction of the instrument declared on by the giving of another, it must state that the substituted instrument was given as well as taken in satisfaction (*d*). Both of which allegations may be involved by the plaintiff in one traverse (*e*).

Duplicity of pleas.

To an action against the acceptor of a bill of exchange, the defendant pleaded, that he made the acceptance by force, and duress of imprisonment, and that he never had any value for accepting or paying the bill, concluding with a verification to this plea: the plaintiff demurred specially. It was held, before the recent statute, abolishing special

(*t*) *Uther* v. *Rich*, 2 P. & D. 579.

(*u*) *Noel* v. *Rich*, 2 C., M. & R. 360; 4 Dowl. 228, S. C.; and see *Noel* v. *Boyd*, 4 Dowl. 415.

(*x*) *Cooper* v. *Morecraft*, 3 M. & W. 500; 6 Dowl. 562, S. C.

(*y*) R. Trin. T. 1853.

(*z*) *Adams* v. *Palk*, 3 Q. B. 2.

(*a*) *Hodgins* v. *Hancock*, 14 M. & W. 120. See other points relating to a plea of payment in the Chapter on PAYMENT. As to the proper mode of pleading payment into court in an action on a bill, see *Tattersall* v. *Parkinson*, 16 L. J., Exch. 196; 4 D. & L. 522; 16 M. & W. 752, S. C.

(*b*) *Morley* v. *Culverwell*, 7 M. & W. 174.

(*c*) *Thorne* v. *Smith*, 10 C. B., 659.

(*d*) *Crisp* v. *Griffiths*, 2 C., M. & R. 159; 3 Dowl. 752; 1 Gale, 106, S. C.

(*e*) *Webb* v. *Weatherby*, 1 Bing. N. C. 502; 1 Scott, 477; 1 Hodges, 39, S. C.; and see *Bennison* v. *Thelwell*, 7 M. & W. 512; *Ridley* v. *Tindall*, 7 Ad. & E. 134.

CHAPTER XXXIV.

demurrers, that the plea was bad for duplicity (*f*). Although one of the grounds of defence be badly pleaded, the plea may, nevertheless, be double (*g*). So where the defendant, as acceptor, pleaded to an action on a bill of exchange brought by the indorsee, that the defendant's bankers paid the bill, and afterwards lost it, and that it came to the plaintiff's hands without consideration; the plea was held bad for duplicity and uncertainty (*h*). And in an action of assumpsit on a bill of exchange, drawn by one S. B. upon and accepted by the defendant for 25*l.*, payable three months after date; the defendant pleaded, that after the bill became due, and before the commencement of the suit, S. B. paid to the plaintiff divers monies, to the amount of 17*l.*, and did for the plaintiff work and labour to the amount of 8*l.*, in full satisfaction and discharge of the sums of money in the bill specified, and of all damages sustained by non-payment thereof, which were then accepted and received by the plaintiff, in such full satisfaction and discharge; and, further, that he, the defendant, accepted the bill at the request and for the accommodation of the said S. B., and not otherwise; and that there never was any consideration or value for the payment by the defendant, of the said bill, or any part thereof; and that the plaintiff at the commencement of the suit, held the bill, without consideration, to which plea the plaintiff demurred; the Court held that the plea was bad for duplicity (*i*). Where, in an action by an indorsee, the plea alleges fraud on the defendant, and then goes on to allege, both absence of consideration moving from the plaintiff, and notice of the facts, the plea is double (*k*).

Special demurrers abolished.

A special demurrer for duplicity must have shown wherein the duplicity consists (*l*). But now all special demurrers are abolished (*m*).

Sham or ensnaring pleas.

Although the Court will not in general determine upon the validity of a plea in point of law, or the truth of it on

(*f*) *Stephens* v. *Underwood*, 4 Bing. N. C. 655; 6 Dowl. 737; 6 Scott, 402, S. C.

(*g*) Per Tindal, C. J.; 4 Bing. N. C. 657; Com. Dig. Pleader, E. 2; and see *Wright* v. *Watts*, 3 Q. B. 89. In *Regil* v. *Green*, 1 M. & W. 328, Parke, B., observes, "This is not precisely duplicity, but the plaintiff has no right to include several matters in his replication so as to embarrass the trial."

(*h*) *Deacon* v. *Stodhart*, 5 Bing. N. C. 594.

(*i*) *Purssord* v. *Peck*, 9 M. & W. 196; *Lane* v. *Ridley*, 10 Q. B. 480.

(*k*) *Leaf* v. *Robson*, 13 M. & W. 651.

(*l*) *Smith* v. *Clench*, 2 Q. B. 835.

(*m*) Common Law Procedure Act, 1852.

motion, except in particular cases, nevertheless where a plea pleaded is beyond doubt a frivolous or sham plea, they will exercise their authority by so doing (*n*). Where in an action on a bill of exchange by the indorsee, against the acceptor, the defendant set forth in his plea a number of facts, calculated to perplex the plaintiff, the Court, on an affidavit of its falsehood, no cause being shown for pleading it, set it aside (*o*).

Statutable jurisdiction over pleadings framed to embarrass.

The Common Law Procedure Act (*p*) gives the Court a statutable jurisdiction in these and other cases by enacting, that if any pleading be so framed as to prejudice, embarrass or delay the fair trial of the action, the Court, or a judge, may strike out or amend it.

REPLICATION DE INJURIA SUPERSEDED.

The use of the general replication, commonly called *de injuriâ*, in actions of debt and assumpsit, was a novelty introduced by the special pleas made necessary in those actions. The general rules regulating its employment in an action of tort were laid down in *Crogate's case* (*q*). Those rules, originally capricious and indefinite, when applied to actions founded on contract, introduced a great deal of refinement, of which it was difficult to perceive the practical utility, and which often defeated justice. These subtleties have all been swept away by the Common Law Procedure Act of 1852, which not only enables a defendant to deny all the allegations contained in a plea, but, where necessary, to reply double.

To plea denying consideration.

To a plea denying consideration, a replication simply averring consideration is good (*r*). And even if the plaintiff, in his replication, set out the particular consideration, and *concluded to the country*, under the old form of pleading, he was not bound to prove it (*s*).

(*n*) *Horner* v. *Keppel*, 10 Ad. & E. 17; 2 P. & D. 234, S. C.

(*o*) *Miley* v. *Walls*, 1 Dowl. 648; and see *Hornor* v. *Keppel*, 10 Ad. & Ell. 17; 2 P. & D. 234, S. C.; *Knowles* v. *Burward*, 10 Ad. & Ell. 19; 2 P. & D. 235, S. C.; *Balmanno* v. *Thompson*, 6 Bing. N. C. 153; 4 Jurist, 43; 8 Scott, 306, S. C.; *Bradbury* v. *Emans*, 5 M. & W. 595; 7 Dowl. P. C. 849, S. C.; *Emanuel* v. *Randall*, 8 Dowl. 238; *Midford* v. *Finden*, 9 Dowl. 813.

(*p*) 15 & 16 Vict. c. 76, s. 52.

(*q*) 8 Rep. 66.

(*r*) *Prescott* v. *Levi*, 3 Dowl. 403; 1 Scott, 726, S. C.; *Bramah* v. *Roberts*, 1 Bing. N. C. 469; 1 Scott, 350, S. C.; *May* v. *Seyler*, 3 Exch. 563.

(*s*) *Low* v. *Burrows*, 2 Ad. & E. 483; 4 N. & M. 366, S. C.; *Batley* v. *Catterall*, 1 M. & Rob. 379.

CHAPTER XXXIV.

Pleading an estoppel.

When a party to a bill, as an acceptor or indorser, is concluded from denying a fact, as, for example, the drawing or a prior indorsement, the estoppel may be replied, or it seems that the plaintiff may demur (*t*). For an estoppel *in pais* need not be pleaded (*u*).

Distributive replication.

Where one plea is pleaded to several notes or bills, the plaintiff may often reply by one replication, which will be construed distributively (*x*).

(*t*) *Sanderson* v. *Collman*, 4 M. & G. 209; *Armani* v. *Castrique*, 13 M. & W. 443.

(*u*) *Vaughan* v. *Matthews*, 18 L. J., Q. B. 191.

(*x*) *Wood* v. *Peyton*, 13 M. & W. 30.

CHAPTER XXXV.

EVIDENCE.

RIGHT TO BEGIN . . 431
Splitting Plaintiff's Case . 432
Competency of Witnesses . 432
Declarations at the Time of making the Instrument . 432
Declaration by prior Parties 432
Effect of Admissions on Record 433
Proof of Signature . . 433
Collateral Security, Memorandum of . . . 433
Identity of Defendant . 433
Evidence of Consideration . 434
Production of the Bill . 434
Proof of Mark . . . 434
Proof of Name . . 434
Proof of Signature by Agent 434
Effect of Admission under Judge's Order . . 435
Bill or Note, Evidence under the Common Counts . 435
What a Paid Check is Evidence of as between Drawer and Payee . 435
As between Banker and Customer . . . 436
Whether an Unpaid Check is Evidence . . . 436
PROOFS IN VARIOUS ACTIONS 436
Payee v. *Maker or Acceptor* 436
Indorsee v. *Maker or Acceptor* 436
Indorsee v. *Indorser or Drawer* . . . 437
Payee v. *Drawer* . . 437
Receipt 437
Statements by deceased Persons 437
AMENDMENT AT THE TRIAL 438

EXCEPT in actions for personal wrongs the party on whom lies the burthen of proof is entitled to begin. But if an error in this respect be committed at the trial, a new trial will not therefore be granted, unless injustice has been done (*a*).

Where, in an action on a bill of exchange, the only issues lying on the plaintiff arise on the common counts, the plaintiff is not entitled to begin, unless he propose to give evidence on those issues (*b*); and merely using the bill as evidence under the common counts will not be sufficient. A defendant will not entitle himself to begin, by admitting all the issues that lie on the plaintiff (*c*).

(*a*) *Cannam* v. *Farmer*, 3 Exch. 698.

(*b*) *Homan* v. *Thompson*, 6 C. & P. 717; *Smart* v. *Rayner*. ibid. 721; *Mills* v. *Oddy*, ibid. 728; 3 Dowl. 722; 2 C., M. & R. 103, S. C.

(*c*) *Pontifex* v. *Jolly*, 9 C. & P. 202.

CHAPTER XXXV.

Splitting plaintiff's case.

A plaintiff cannot split his case (*d*), except by first proving the issues which lie on him, and no more. But having done that, he may reserve his evidence applicable to the issues lying on the defendant.

Competency of witnesses.

Many nice distinctions formerly existed as to the competency of witnesses in actions of bills of exchange.

To review the decisions and the various statutable enactments by which the legislature gradually felt its way to a more liberal system, would be more appropriate in a treatise on the law of evidence.

It may suffice to observe here, that not only all the parties to a bill, but the plaintiffs and defendants themselves, in the action or suit, as well as their husbands and wives, are now all rendered competent witnesses (*e*).

Declarations at the time of making the instrument.

In an action by the indorsee against the maker of a note the declarations of the payee at the time of making it are evidence as part of the *res gestæ* (*f*).

Declarations by prior parties.

It has been held, that declarations by the holder of a negotiable instrument, made whilst he was holder, are evidence against a plaintiff who claims under him and stands on his title (*g*), in the same manner as declarations made by a former owner of an estate respecting his own title, whilst he was in possession, are evidence against a subsequent owner (*h*).

But there is an obvious distinction between the case of an assignee of land or other property and the ordinary assignee of a negotiable instrument. The former has, in general, no title either at law or in equity, unless his assignor had, but the latter may, as we have seen, have a very good title, though his assignor had none at all. Accordingly, it has been decided that unless the plaintiff on a bill or note stands on the title of a former holder, the declarations of such former holder are not evidence against him (*i*). But if he does stand on the title of a prior holder, as if he have taken the bill overdue or without consideration, then the

(*d*) *Jacobs* v. *Tarleton*, 17 L. J., Q. B. 194.

(*e*) 14 & 15 Vict. c. 99, and 16 & 17 Vict. c. 83.

(*f*) *Kent* v. *Lowen*, 1 Camp. 177, 180.

(*g*) *Pocock* v. *Billing*, 2 Bing. 269; Ry. & M. 127, S. C.

(*h*) *Woolway* v. *Rowe*, 1 Ad. & E. 114; 3 N. & M. 849, S. C.

(*i*) *Barough* v. *White*, 4 B. & C. 325; 6 D. & Ry. 379; 2 C. & P. 8, S. C.; *Beauchamp* v. *Parry*, 1 B. & Ad. 89; *Shaw* v. *Broom*, 4 D. & R. 731; *Smith* v. *De Wruitz*, 1 R. & M. 212; and see *Phillips* v. *Cole*, 10 Ad. & E. 106; 2 P. & D. 288, S. C.

declarations of that prior holder under whom he claims, and on whose title he stands, are evidence against him.

Effect of admission on record.

It has been held, that a jury can draw no inference from an admission on record. "The pleadings," says Alderson, B., "are not before the jury, but only the issue" (*k*). But the Court of Queen's Bench have held otherwise (*l*).

Proof of signature.

Where there was no attesting witness, the signature to a bill might always have been proved by any person who has seen the party write, or has received letters from him.

Where there was an attesting witness, he must always have been called, unless dead, insane, or out of the jurisdiction of the Court (*m*). But now by the 17 & 18 Vict. c. 125, s. 26, it is not necessary to call the attesting witness, except in those cases where his attestation is essential to the validity of the instrument (*n*).

Collateral security.

An agreement that certain shares are to be held as a collateral security for a bill is evidence to prove an allegation that any sum received by the holder should be satisfaction *pro tanto* (*o*).

Identity of defendant.

It was at one time held, that there must be some evidence of the identity of the person whose handwriting is proved as the defendant's with the real defendant, and that mere correspondence of christian and surname is no evidence of identity (*p*). But the inconvenience of such a doctrine soon compelled the Courts to retrace their steps. "The transactions of the world," says Lord Denman, "could not go on, if such an objection were to prevail. It is unfortunate that the doubt should ever have been raised, and it is best that we should sweep it away as soon as we can" (*q*).

(*k*) *Edmunds* v. *Groves*, 2 M. & W. 642; 5 Dowl. 775, S. C.

(*l*) *Bingham* v. *Stanley*, 2 Q. B. 117; see *Malpas* v. *Clements*, 19 L. J., Q. B. 435. In *Robins* v. *Maidstone*, 4 Q. B. 815, the Court of Q. B. corrected the language attributed to them in *Bingham* v. *Stanley*; and see *Smith* v. *Martin*, 9 M. & W. 304; *Fearn* v. *Filica*, 7 M. & G. 513.

(*m*) The attesting witness must have been called, though the attestation were on the back of the bill. *Richards* v. *Frankum*, 9 C. & P. 221; and though he were blind, *Crank* v. *Frith*, 2 Moo. & Rob. 262.

(*n*) See ante, as to the cases in which attestation to a bill or note is or was essential.

(*o*) *Malpas* v. *Clements*, 19 L. J., Q. B. 435.

(*p*) *Whitelock* v. *Musgrove*, 1 C. & M. 511; *Jones* v. *Jones*, 9 M. & W. 75; 11 L. J., Exch. 265; *Bell* v. *Gunn*, 11 L. J., C. P. 57. As to identity of first indorser with drawer, see *Smith* v. *Moneypenny*, 2 Moo. & Rob. 317.

(*q*) *Sewell* v. *Evans*, 4 Q. B. 626; *Roden* v. *Ryde*, ibid.;

CHAPTER XXXV.

It is conceived that there must be some peculiar circumstances tending to raise a question, before the plaintiff can be required to show, that the person who signed the bill or note, and whose christian and surname agree with the defendant's, is the *person who was served with the writ*, for that person is the real defendant in every action.

Evidence of consideration.

Where it is necessary to prove the consideration, and on whom the burthen of proof lies, see the Chapter on CONSIDERATION.

Production of the bill.

It is not necessary to produce the bill on the trial, unless some issue be joined, which renders the production of the bill necessary (*r*); nor on a writ of inquiry (*s*); nor will statements in the plea entitle the defendant to offer evidence of it without notice to produce (*t*). But if interest be sought from a period before the issuing of the writ it may be necessary to produce the bill (*u*).

Proof of mark.

If a bill or note be signed or indorsed with a mark, such mark may be proved by a person who has seen the party so execute instruments, and can recognize some peculiarity in the mark (*v*).

Proof of name.

Where an acceptance is by the christian and surname of the drawer, a witness who has seen him write his surname only is competent to prove the acceptance (*w*).

Proof of signature by agent.

An averment that the defendant made a note, "his own proper hand being thereunto subscribed," is satisfied by proof that the note was made by an agent, for those words may be rejected as surplusage (*x*).

Hamber v. *Roberts*, 18 L. J., C. P. 250.

(*r*) *Shearm* v. *Burnard*, 10 Ad. & E. 593; 2 Per. & Dav. 565; *Read* v. *Gamble*, 5 N. & M. 433; 10 Ad. & E. 597, n., S. C.; but see *Fryer* v. *Brown*, R. & M. 145.

(*s*) *Lane* v. *Mullins*, 1 Gale & Dav. 712; 11 L. J., Q. B. 51; 2 Q. B. 254, S. C.; *Davis* v. *Barker*, 3 C. B. 606; and the production of the bill may be rendered unnecessary by an admission of the handwriting, *Chaplin* v. *Levy*, 23 L. J., Exch. 117; 9 Exch. 531, S. C.

(*t*) *Goodered* v. *Armour*, 3 Q. B. 956. As to what is a sufficient notice, see *Lawrence* v. *Clark*, 3 D. & L. 87.

(*u*) *Hutton* v. *Ward*, 15 Q. B. 26.

(*v*) *George* v. *Surrey*, M. & M. 516.

(*w*) *Lewis* v. *Sapio*, M. & M. 39, overruling *Powell* v. *Ford*, 2 Stark. 164.

(*x*) *Booth* v. *Grove*, M. & M. 182; 3 C. & P. 335, S. C.

An admission under a Judge's order that a bill was accepted by A. for B., is an admission of A.'s authority (*y*).

Effect of admission under Judge's order.

A promissory note, as between the original parties, is evidence of money lent (*z*), and of an account stated when the note falls due (*a*), and is admissible as a paper or writing to prove the defendants' receipt of so much money; and even although it has been invalidated, *as a note*, by alteration (*b*). But a bill which never was properly stamped is not admissible in evidence for collateral purposes, though formerly held to be so (*c*). An instrument though not stamped is admissible to show that the transaction is void, as for usury (*d*). An instrument promising payment on condition, which, as we have seen, is not a promissory note, is not evidence to sustain the money counts (*e*).

Bill or note, evidence under the common counts.

Upon principle, it appears clearly that a bill or note can be evidence under the money counts only as between immediate parties, and the later decisions are in favour of this doctrine (*f*), though it has been held evidence of money received to the use of the holder (*g*).

An indorsement is *primâ facie* evidence of money lent by the indorsee to the indorser (*h*), and of an account stated (*i*).

What a paid check is evidence of as between drawer and payee.

A check that has been presented and duly paid by the banker is no evidence of money lent by the drawer to the payee.

For the mere fact of money passing from A. to B. is of itself no proof of a loan from A. to B. (*j*). Nor is the fact

(*y*) *Wilkes* v. *Hopkins*, 1 C. B. 737.

(*z*) *Clarke* v. *Martin*, Ld. Raym. 758; per Lord Mansfield in *Grant* v. *Vaughan*, 3 Burr. 1525; Bayley, 357; *Morgan* v. *Jones*, 1 C. & J. 167; *Smith* v. *Kendall*, 6 T. R. 123; but see *Fesenmayer* v. *Adcock*, 16 M. & W. 449. Money deposited with a banker is money lent. *Pott* v. *Clegg*, 16 M. & W. 321.

(*a*) *Wheatley* v. *Williams*, 1 M. & W. 539; *Irving* v. *Veitch*, 3 M. & W. 90.

(*b*) *Sutton* v. *Toomer*, 7 B. & C. 416; 1 Man. & R. 125, S. C.; *Tomkins* v. *Ashby*, 6 B. & C. 541; 9 Dowl. & R. 543; M. & M. 32, S. C. But see ante.

(*c*) *Jardine* v. *Payne*, 1 B. & Ad. 663; *Jones* v. *Ryder*, 4 M. & W. 32; *Holmes* v. *Mackrill*, 3 C. B., N. S. 789.

(*d*) *Nash* v. *Duncomb*, 1 M. & Rob. 104.

(*e*) *Morgan* v. *Jones*, 1 C. & J. 162; 1 Tyrw. 21, S. C.

(*f*) *Waynam* v. *Bend*, 1 Camp. 175; *Bentley* v. *Northhouse*, M. & M. 66; *Eales* v. *Dicker*, M. & M. 324; Bayley, 357, 6th ed.

(*g*) *Vide* Chitty, 9th ed. 581, and Bayley, 6th ed. p. 358; *Grant* v. *Vaughan*, 3 Burr. 1516.

(*h*) *Kessebower* v. *Tims*, Bayley, 6th ed. 357 and 359.

(*i*) *Burmester* v. *Hogarth*, 11 M. & W. 101; *Fryer* v. *Roe*, 12 C. B. 437.

(*j*) *Welch* v. *Seaborn*, 1 Stark. 474; *Pearce* v. *Davis*, 1 Mood. & Rob. 365.

CHAPTER XXXV.

that A.'s check in favour of B. has been paid by the banker, and that the check bears B.'s indorsement. For all that appears is that A.'s money has been paid by A. to B. through a banker; but whether as a loan from A. to B., or whether as a repayment of money previously due from A. to B. on some other account, or whether because B. had cashed the check, does not appear. And a fact which is equally consistent with any one of three different hypotheses is proof of no one of the three. The indorsement makes no difference, for that merely shows that the check passed through B.'s hands, and may have been added at the banker's request for the banker's better security, although had the check got into the hands of a subsequent holder with B.'s indorsement on it, that indorsement might then have been evidence of money lent by the holder to B. or of an account stated between them (*k*).

As between banker and customer.

As between banker and customer a check paid by the banker is no proof of money lent or advanced by the banker to the customer, but *primâ facie* it shows a return of money previously deposited by the customer with the banker.

Whether an unpaid check is evidence.

A check not presented has been held not to be evidence of money lent by the drawer to the payee (*l*).

PROOFS IN VARIOUS ACTIONS.

Payee v. maker or acceptor.

In an action by the payee against the maker of a note or acceptor of a bill, the plaintiff must, if the making or acceptance be in issue, prove the handwriting (*m*) of the person whose name appears as the maker of the note or acceptor of the bill.

Indorsee v. maker or acceptor.

In an action by the indorsee against a maker or acceptor, the plaintiff must first prove the making of the note or the acceptance of the bill. We have already seen that the acceptance admits the drawing. Then the indorsement must be proved, and if it be special, it must appear that the indorsee is the person described in it. If the instrument be

(*k*) *Rogers* v. *Flook*, Bristol Summer Assizes, 1866.

(*l*) *Pearce* v. *Davis*, 1 M. & Rob. 365.

(*m*) By the Common Law Procedure Act, 1852, s. 117, either party may call on the other party by notice to admit any document saving all just exceptions, and in case of refusal or neglect to admit, the costs of proving the document shall be paid by the party neglecting or refusing, unless at the trial the Judge shall certify that the refusal to admit was reasonable; and no costs of proving any document shall be allowed unless such notice shall be given, except in cases where the omission to give the notice is in the opinion of the Master a saving of expense. And see R. 30, H. T. 1853.

payable to bearer, or indorsed in blank, it is of course unnecessary to allege or prove (*n*) a subsequent indorsement.

A promise to pay, or an offer to renew a bill or note, made to the indorsee after it is due, is an admission of the holder's title, and will make the proof of indorsement unnecessary (*o*). But the admission of an indorser is evidence against him only, not against other parties (*p*).

Indorsee *v.* indorser or drawer, and payee *v.* drawer.

In an action by an indorsee against an indorser, it is necessary, first, to prove the indorser's signature, which admits the ability and signature of every antecedent party (*q*); then a due presentment (*r*) for payment or acceptance, and dishonour; and, lastly, notice of dishonour, or, if the record admit of such proof, a competent excuse for neglecting to give it.

An indorsement is evidence, in this action, under the common counts (*s*).

Receipt.

A general receipt on the back of a bill is not of itself evidence of the payment by the drawer, though he produces the bill (*t*), for "*primâ facie*," says Lord Kenyon, "the receipt on the back imports that it was paid by the acceptor." But this doctrine must be taken with the qualification that slight circumstances will show the contrary (*u*).

Parol evidence is admissible to explain the receipt (*x*).

Statements by deceased persons.

An entry or statement by a person since deceased against his own pecuniary interest, whenever made, is evidence between third persons of the fact which it records (*y*).

And a minute in writing by a person since deceased, made in the ordinary course of his business, and contemporaneous with the fact it records, is also evidence (*z*).

(*n*) Unless averred in the declaration. See Chapter on TRANSFER.

(*o*) *Hankey* v. *Wilson*, Sayer, 223; *Bosanquet* v. *Anderson*, 6 Esp. 43; *Sidford* v. *Chambers*, 1 Stark. 326; *Jones* v. *Morgan*, 2 Camp. 474.

(*p*) *Hemings* v. *Robinson*, Barnes, 436.

(*q*) *Critchlow* v. *Parry*, 2 Camp. 182; *Chaters* v. *Bell*, 4 Esp. 210; *Lambert* v. *Pack*, 1 Salk. 127; *Macgregor* v. *Rhodes*, 25 L. J., Q. B. 318; 6 E. & B. 266, S. C.

(*r*) *I. e.* if denied by the plea,

(*s*) *Kessebower* v. *Tims*, Bayley, 6th ed.; and see ante.

(*t*) *Scholey* v. *Walsby*, Peake, 24.

(*u*) See *Phillips* v. *Warren*, 14 M. & W. 379.

(*x*) *Graves* v. *Key*, 3 B. & Ad. 313.

(*y*) *Higham* v. *Ridgway*, 1 East, 109. See the notes to this case in 2 Smith's Lead. Ca. 193. But as to memoranda on the bill or note itself, see the Chapter on the STATUTE OF LIMITATIONS.

(*z*) *Price* v. *Earl of Torrington*, 1 Salk. 285. See the notes to 1 Smith's Lead. Ca. 139, and *East-*

CHAPTER XXXV.

AMENDMENT AT THE TRIAL.

There are several statutes enabling a Judge to cure a variance by amending the record at the trial; the 9 Geo. 4, c. 15; the 3 & 4 Will. 4, c. 42, s. 23; the 15 & 16 Vict. c. 76, s. 222, and the 17 & 18 Vict. c. 125, s. 96.

Where there is a variance between a bill or note and the record, the Judge, at the trial might, under the 9 Geo. 4, c. 15, order the record to be amended; but whether he would allow the amendment or not rested in his discretion, and it should seem that it was not competent for the Court above to review the exercise of that discretion (*a*).

Where, in an action by the indorsee against the drawer, the declaration stated that the bill was accepted, "payable at Esdaile and Co.'s, Bankers, London, *or at No.* 18, *Poland Street, Oxford Street*," and it appeared on the face of the bill that the latter alternative place of payment was not in the acceptor's handwriting, but that it had been added afterwards, Lord Tenterden refused to allow an amendment. "The object of the act of Parliament," says his Lordship, "was to prevent a failure of justice from accidental errors. Now this is a blunder that no man could make who would but use his eyesight. I have always thought that we have gone too far from the strict rules for the purpose of obtaining justice in some particular case. The consequence of which has been, that those cases having been quoted as precedents, great laxity has been introduced into the practice" (*b*). But where, in an action by an indorsee against an indorser, the declaration stated the bill to have been made payable to the drawer, and to have been indorsed by him, whereas the bill, when produced, appeared to have been made payable to another payee, and to have been indorsed by such other payee, the Judge allowed the record to be amended, and the Court of Exchequer, after intimating an opinion that they were not competent to review the amendment, said, that in their judgment the discretion had been properly exercised (*c*). A variance in the date would be amended (*d*). An amendment could be made under this statute only where a party assumed to set out a written instrument.

The power of amendment was next much enlarged by the 3 & 4 Will. 4, c. 42, s. 23, and was exercised under this

ern Union Railway Company v. *Symonds*, 5 Exch. 237.

(*a*) *Parks* v. *Edge*, 1 C. & M. 429; 3 Tyr. 364; 1 Dowl. 643, S. C. See *Lamey* v. *Bishop*, 4 B. & Ad. 479; 1 N. & M. 332, S. C.

(*b*) *Jelf* v. *Oriel*, 4 C. & P. 22.

(*c*) *Parks* v. *Edge*, 1 C. & M. 429; 3 Tyr. 364; 1 Dowl. 643, S. C.

(*d*) *Bentzing* v. *Scott*, 4 C. & P. 24.

act so liberally and beneficially, as to cure most instances of variance in actions on bills. Where the acceptor had died before presentment for payment, and the declaration in an action against the indorser averred a presentment to the drawee, on which averment issue was taken, the plaintiff was permitted to amend by inserting an averment as well of the drawee's death as of presentment to his executor (*e*).

Yet the amendment must not have been such as would make the declaration bad on special demurrer (*f*). But this objection to the amendment must be pointed out at the time (*g*).

Lastly, the statutes 15 & 16 Vict. c. 76, s. 222, and 17 & 18 Vict. c. 125, s. 96, now enable the Court or a Judge to amend in almost any case, imposing such terms as to postponement of the cause, payment of the costs, or otherwise, as shall best promote the ends of justice (*h*). They even go further, and *oblige* not only the Judge at Nisi Prius, but the Court in Banc, and even a Court of Error, to make all amendments necessary to determine the real question in controversy. No recent enactments have been found by experience to be more beneficial than these.

(*e*) *Caunt* v. *Thompson*, 18 L. J., C. P. 125; 7 C. B. 400, S. C.

(*f*) *Evans* v. *Powis*, 1 Exch. 601.

(*g*) *Bury* v. *Blogg*, 18 L. J., Q. B. 57; 12 Q. B. 877, S. C.

(*h*) See *Wilkin* v. *Reed*, 15 C. B. 192; *Ritchie* v. *Van Gelder*, 9 Exch. 762.

CHAPTER XXXVI.

OF THE BANKRUPTCY OF PARTIES TO A BILL OR NOTE.

Vesting of Bankrupt's Property in the Trustee . 441
Relation of Adjudication in Bankruptcy . . . 441
Protected Transactions . 442
What amounts to Notice of Act of Bankruptcy . 443
Bill to Petitioning Creditor 444
In what Cases the Holder may prove 444
Bills and Notes not yet due 444
Proof of a Bill or Note Payable on Demand . 444
Bill payable after Notice . 445
Irregular Bill or Note . 445
Bill cannot be proved against a Man not a Party to it . 445
Proof of Lost Bill . . 445
Proof by a Surety or Person liable for the Debt of a Bankrupt . . . 445
Debts and Liabilities, now proveable 447
Holder may and must elect between Proof and Action 447
MUTUAL ACCOMMODATION BILLS 448
Where there has been Specific Exchange of Securities 448
What amounts to Specific Exchange 449
Party to Mutual Specific Exchange of Paper must pay his own Paper before he can prove . . . 449
Mutual Accommodation without Specific Exchange 449
After Holder has proved, no further Proof . . 450
Cases of Mutual Accommodation without Specific Exchange, Mutual Bankruptcy, and Cash Balance . . . 450
Accommodation Bills in the hands of an Indorsee for Value 454
Proof of Interest . . 455
Of Expenses, Re-exchange, &c. 455
Where there are several Adjudications of Bankruptcy, under which, and for how much, the Holder may prove . . . 455
Proof against Joint and separate Estate . . 456
Where a Creditor holds a Bill as a Security . . 457
Proof where a Transfer after Acceptor's Bankruptcy 457
Acts of Bankruptcy in respect of Bills . . 457
When a Bill may be a good Petitioning Creditor's Debt . . . 457
Evidence of the Date of a Bill 459
Distinction between Traders and Non-traders . . 459
What Transactions in respect of Bills will constitute a Trading within the Bankrupt Laws . . 459
REPUTED OWNERSHIP . 460
Debts formerly within it . 460
Dormant Partner . . 460
Now Trade Debts only . 460
Bills and Notes may be within it 461
Bills in the hands of a Banker, &c., becoming Bankrupt, do not pass under it . . . 462
DEPOSITED SECURITIES . 463
Holder's Right to the Benefit of Security in the Event of Bankruptcy . 463

To Securities deposited with Acceptor . . . 463
With third Persons . . 464
In Case of Guarantee given to Acceptor . . . 464
Transfer in Case of Bankruptcy of Holder . . 464
Where the Bankrupt is a Trustee 464
When the Transfer of a Bill by a Bankrupt is Payment 464
Transfer to a Bankrupt . 465
When his Capacity admitted 465
Bill or Note for Debt barred by Certificate or Order of Discharge . 465
FRAUDULENT PREFERENCE 466
VOLUNTARY TRANSFER . 467
DISCHARGE OF INSOLVENT DEBTORS . . . 467
Acts recently in Force . 467
Their general object in regard to Bills and Notes . 468
Their effect on the Liability of the Insolvent to Holders of a Negotiable Instrument . . . 468
Effect of Discharge of one of two Makers of a Note . 469
Description of the Bill in the Schedule . . . 469
Notice to the Creditor . 469
Effect of the Insolvent's Discharge on the Liability of other Persons to the Holder . . . 470
Effect of a Bill or Note given for the Debt for which the Insolvent has been discharged . . 470
Of a Bill or Note given to prevent Opposition . . 470
Effect of Vesting Order . 470

CHAPTER XXXVI.

To discuss at length the subject of bankruptcy would far exceed our limits; and even to attempt a compendium in its present state of transition would be perilous. It is proposed, therefore, merely to sketch an outline of the law so far as it relates to bills of exchange and promissory notes.

It is impossible at present to neglect the consideration of the statute law as it existed before the late general act (*a*), because past transactions under the repealed statutes will for some years hereafter continue to be the subject of judicial inquiry.

Vesting of bankrupt's property in the trustee.

Immediately on adjudication, all the bankrupt's beneficial property (*b*), including bills and notes, now passes to the registrar provisionally (*c*), till the appointment of the trustee in bankruptcy, and then it passes to that trustee and vests in him.

Former relation of the adjudication in bankruptcy.

The title of assignees (unless where restrained by particular enactment) formerly related to any act of bankruptcy

(*a*) 32 & 33 Vict. c. 71. This act read with the 32 & 33 Vict. c. 83, repealing former acts, takes away the power of a debtor to make himself bankrupt on his own petition.

(*b*) The word property is used in its most extensive sense, and includes money, goods, things in action, land and every description of property whether real or personal; also obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, arising out of or incident to property, as above defined. 32 & 33 Vict. c. 71, s. 4.

(*c*) 31 & 32 Vict. c. 71, s. 16.

CHAPTER XXXVI.

after the date of the petitioning creditor's debt, and not more than twelve months before the petition (*a*), but not to any act of bankruptcy before that date.

It did not of course relate to any act of bankruptcy prior to the petitioning creditor's debt, if there were not, at the time of such prior act of bankruptcy, another sufficient debt whereon to found an adjudication (*b*). Nor even if there were a sufficient debt; for as that would, even before the 46 Geo. 3, c. 145, s. 5, have invalidated the commission (*c*), the assignees could not rely on it. The 46 Geo. 3, c. 145, s. 5, and the corresponding enactments, 6 Geo. 4, c. 16, s. 19, and 12 & 13 Vict. c. 106, s. 88, though they relieved the assignees from the *disabling* effect of such prior act of bankruptcy, did not go further, and *enable* the assignees to take advantage of it.

Hence, it followed that the assignees could not treat transactions with the bankrupt in respect of bills and notes, as acts of bankruptcy, except after an act of bankruptcy within the reach of the petitioning creditor's debt (*d*).

Further particular limitations within this general limitation were introduced by the old statutes, and by various sections of the 12 & 13 Vict. c. 106.

Present relation of the adjudication.

The title of the trustee in bankruptcy now relates back to the act of bankruptcy on which the adjudication proceeded. And if there be several acts of bankruptcy, then to the earliest within twelve months before the adjudication, but not to any prior act of bankruptcy, unless the bankrupt were then indebted to a creditor or creditors in a sum sufficient to support a petition for adjudication, and that debt or those debts be still due (*e*).

Protected transactions under former statutes.

Conveyances, contracts and other transactions by the bankrupt, and executions against him, though after an act

(*a*) The act of bankruptcy must have been within twelve months before the petition; 12 & 13 Vict. c. 106, s. 88. There could be no relation to a prior act of bankruptcy where the bankrupt himself was petitioner. *Stevenson* v. *Newnham*, 13 C. B. 285; *Nicholson* v. *Cooch*, 5 E. & B. 999; *Monk* v. *Sharp*, 27 L. J., Exch. 29; *Shrubsole* v. *Sussams*, C. P., E. T., 1864; *Toppy* v. *Keysell*, S. P.

(*b*) *Doe* v. *Boulcot*, 2 Esp. 595.

(*c*) The bankrupt could not, under any circumstances, have availed himself of a prior act of bankruptcy to defeat the commission. *Donovan* v. *Duff*, 9 East, 21; *Rex* v. *Bullock*, 1 Taunt. 71.

(*d*) *Ward* v. *Clarke*, M. & M. 497; *Ex parte Birkett*, 2 Rose, 71; *Norman* v. *Booth*, 10 B. & C. 703; The provisions of the 6 Geo. 4, c. 16, s. 18, for the substitution of another debt for the petitioning creditor's, provided that the substituted debt shall not be of prior date. This proviso is omitted in the corresponding enactment, 12 & 13 Vict. c. 106, s. 103.

(*e*) 32 & 33 Vict. c. 71, s. 11.

of bankruptcy, if without notice of it and more than two months before the issuing of the fiat, were valid even before the former General Bankrupt Act (*f*).

Thus, where a bill of exchange was delivered by a bankrupt, with intent to transfer the property, more than two months before the commission issued, though not actually indorsed till within the two months, it was holden to vest in the indorsee, and not in the assignees (*g*).

And all *bonâ fide* payments by or to any bankrupt, and all contracts, dealings and transactions with the bankrupt, before the filing of a petition for adjudication of bankruptcy, *without notice* of an act of bankruptcy, were protected (*h*).

Purchasers of any property from the bankrupt, *bonâ fide* and for valuable consideration after an act of bankruptcy, and *with notice* thereof, were protected, unless a petition for adjudication of bankruptcy should have been filed within twelve months after such act of bankruptcy (*i*).

The title to property sold under an adjudication of bankruptcy could not be impeached by the bankrupt, or any person claiming under him, unless the bankrupt had commenced proceedings to annul the petition within twenty-one days from its advertisement in the *Gazette* (*j*).

Under the recent act.

Now by the recent act 32 & 33 Vict. c. 71, s. 92, all honest payments to a bankrupt for value received, all contracts or dealings with the bankrupt, made in good faith and for valuable consideration, before adjudication, and without notice of an act of bankruptcy available for adjudication, are protected.

What amounts to notice of an act of bankruptcy.

It seems that the expression, notice of an act of bankruptcy, is satisfied by a general notice that the party has committed an act of bankruptcy. And that notice of the specific act is not necessary (*k*). It may be given to the party's attorney (*l*); but not to a mere clerk in the attorney's office, not having the management of the affair (*m*).

(*f*) 6 Geo. 4, c. 16, s. 81.

(*g*) Anon., 1 Camp. 492, n.

(*h*) 12 & 13 Vict. c. 106, s. 133, repealing and re-enacting the 2 Vict. c. 11, and 2 & 3 Vict. c. 29.

(*i*) 12 & 13 Vict. c. 106, s. 134; see s. 86 of 6 Geo. 4, c. 16.

(*j*) 12 & 13 Vict. c. 106, ss. 131 and 233; further periods are given him if he were out of the United Kingdom, s. 233.

(*k*) *Udal* v. *Walton*, 14 M. & W. 254; and see *Conway* v. *Nall*, 1 C. B. 648; *Follett* v. *Hoppe*, 17 L. J., C. P. 76.

(*l*) *Rothwell* v. *Timbrell*, 1 Dowl. N. S. 779.

(*m*) *Pike* v. *Stephens*, 12 Q. B. 465; 18 L. J., C. P. 291; see *Pennell* v. *Stephens*; *Fawcett* v. *Fearne*, 6 Q. B. 20; *Green* v. *Steer*, 1 Q. B. 710. Notice to the sheriff is not sufficient to defeat an execution. *Ramsey* v. *Eaton*, 10 M. & W. 22.

CHAPTER XXXVI.

It may be given to the accredited agent of a body corporate or public company (*n*).

Bill to petitioning creditor.

A bill given by the bankrupt to a petitioning creditor after bankruptcy is a void transaction, and may be an additional act of bankruptcy (*o*).

In what cases the holder may prove.

In almost all cases where a bankrupt would be liable to an action at law or suit in equity by the holder of a bill or note, the holder may prove on the bankrupt's estate for the amount. And whatever would be a defence to a suit in law or equity, will be an answer to such proof (*p*). All debts and liabilities, present or future, certain or contingent, including even unliquidated damages arising from a breach of contract, are now proveable (*q*).

The good part of a bill may in some cases in the event of bankruptcy be separated from the bad. Where a stock-jobber having a large sum of money in his hands to be employed in stock-jobbing transactions, contrary to the 7 Geo. 2, c. 8, diverted part to his own use, and gave promissory notes to his employer, they were allowed to be proved only to the extent of the money diverted from the illegal purpose to the stock-jobber's own use (*r*). "The equity is," says the Lord Chancellor, "that where the consideration consists of two parts, one bad, the other good, the bill shall stand as to what is good" (*s*).

Bills not due.

Bills, notes and other securities, not due at the time of the bankruptcy, may be proved, deducting a rebate of interest, at such rate per cent. as the rules or practice of the court may prescribe, to be computed from the declaration of a dividend (*t*).

Proof of bill or note payable on demand.

The holder of a note payable on demand may prove, though no demand has been made before the act of bankruptcy (*u*).

(*n*) 12 & 13 Vict. c. 106, s. 89.

(*o*) *Rose* v. *Main*, 1 Bing. N. C. 357; 1 Scott, 127, S. C. See 12 & 13 Vict. c. 106, ss. 71 and 268.

(*p*) See *Ex parte Dewdney*, 15 Ves. 495; *Ex parte Smith*, 3 Bro. C. C. 1; *Ex parte Wilson*, 11 Ves. 410; *Ex parte Gifford*, 6 Ves. 807; *Ex parte Heath*, 2 V. & B. 240; *Ex parte Barclay*, 7 Ves. 797; *Ex parte Rofey*, 19 Ves. 488; 2 Rose, 245, S. C.

(*q*) 32 & 33 Vict. c. 71, s. 31; and see the repealed act, 24 & 25 Vict. c. 134, s. 153. See also *Wood* v. *Dematos*, 1 L. Rep., Ex. 100, and *Hoggarth* v. *Taylor*, 2 L. R., Ex. 105; *Robertson* v. *Goss*, 2 L. R., Ex. 396.

(*r*) *Ex parte Bulmer*, 13 Ves. 313.

(*s*) *Ex parte Mather*, 3 Ves. 373; see ante.

(*t*) See the repealed acts, 12 & 13 Vict. c. 106, s. 172, and 6 Geo. 4, c. 16, s. 51; and now 32 & 33 Vict. c. 71, s. 31.

(*u*) *Ex parte Beaufoy*, Co. B.

A note payable at twelve months' notice, with interest, is proveable against the estate of the maker, though he become bankrupt before any notice is given (*x*).

Bill payable after notice.

A bill or note defective in its necessary form, or void for want of a stamp (*y*), or payable on a contingency (*z*), or payable in notes (*a*), is not, *as a bill or note*, proveable.

Irregular bill or note.

A bill, *as such*, cannot be proved against a man who is not a party to the instrument (*b*), though he give a written engagement, not on the bill, to guarantee the payment of it (*c*). But the holder may prove on such an engagement made before the bankruptcy (*d*). And in other cases the estate may be liable to proof for the consideration, though not for the bill itself (*e*).

Bill cannot be proved against a man not a party to it.

And it has been held, that a person who passes a bill without indorsement, and takes it up after the acceptor has become bankrupt, will not be allowed to prove it against the acceptor's estate (*f*).

Where a bill has been lost, a party claiming to prove must, as a general rule, give an indemnity to the satisfaction of the court (*g*). But in some cases this will be dispensed with (*h*).

Proof of lost bill.

The former Bankrupt Act, 6 Geo. 4, c. 16, s. 52, and the corresponding provision in 12 & 13 Vict. c. 106, s. 178, enact, that any person who, at the issuing of the commission, may have become, without notice of an act of bankruptcy, surety, or liable for the debt of the bankrupt, and

Proof by a surety or party liable for the debt of the bankrupt.

Law, 180; and 32 & 33 Vict. c. 71, s. 31.

(*x*) *Clayton* v. *Gosling*, 5 B. & C. 360; 8 D. & R. 110, S. C.; *Ex parte Elgar*, 2 G. & J. 1; *Ex parte Downman*, 2 G. & J. 85, and 2 G. & J. 241; and see now 32 & 33 Vict. c. 71, s. 31.

(*y*) *Ex parte Manners*, 1 Rose, 68.

(*z*) *Ex parte Ivotel*, 4 Ves. 372.

(*a*) *Ex parte Immeson*, 2 Rose, 225; *Ex parte Davison*, Buck. 31.

(*b*) *Ex parte Roberts*, 2 Cox, 171; *Ex parte Bird*, 4 De Gex & S. 273.

(*c*) *Ex parte Harrison*, 2 Cox, 172; 2 Bro. C. C. 614, S. C.; *In re Barrington*, 2 Scho. & Lef. 112; *Ex parte Hustler*, 1 G. & J. 9.

(*d*) *Ex parte Bell*, 1 Mont. B. L. 194; and see *Ex parte Blackburn*, 10 Ves. 206; *Ex parte Rathbone*, Buck. 215; and see now 32 & 33 Vict. c. 71, s. 31.

(*e*) Ibid., and *Ex parte Robinson*, Buck. 113.

(*f*) *Ex parte Isbester*, 1 Rose, 20. See the Chapters on TRANSFER and NOTICE OF DISHONOUR.

(*g*) *Ex parte Greenway*, 6 Ves. 812; General Order, Nov. 12th, 1842, r. 25.

(*h*) *Ex parte Webster*, De Gex, 414; and see 17 & 18 Vict. c. 125, s. 87.

CHAPTER XXXVI.

shall have paid the debt or any part in discharge of the whole, though after the commission, shall, if the creditor have proved, stand in his place, and receive the dividends; and if the creditor have not proved shall be entitled to prove.

A man who was at law a principal, if he were in equity a surety, was within the section, the jurisdiction in bankruptcy being equitable as well as legal (*i*).

Hence, not only a party who was on the face of a bill or note surety for a bankrupt, but one who had accepted, drawn, made, or indorsed a bill or note for the accommodation of the bankrupt, might, at any time after he had paid it, prove the amount upon the estate, though he did not pay it till after the commission issued, for he was deemed a surety or person liable for the debt of the bankrupt within the statute (*k*), and was entitled, if the party to whom he paid the bill had proved his debt, to stand in his place as to the dividends and all other rights under the commission, and would be barred by the certificate (*l*). But an election by the holder to prove would not conclude the drawer, but the drawer having paid the holder, might sue the bankrupt before certificate (*m*). Where, upon a dissolution of partnership, the partner continuing the business, expressly agreed to assume the liabilities of the firm and to guarantee the retiring partners, and he becoming bankrupt, they were obliged to pay a bill accepted by the firm, the retiring partners were considered as persons liable for the debts of the bankrupt, were entitled to prove under his commission, and were barred by his certificate (*n*). If the suretyship commenced before notice of an act of bankruptcy, it might be continued afterwards, as, for example, by the renewal of an acceptance (*o*). But where a bond or promissory note was given by a principal and several sureties, and one of the sureties became a bankrupt, his obligation was not considered to be a debt within the statute for which the co-sureties were liable (*p*). Where the accommodation acceptor had sustained special damage, an action for damage was barred by

(*i*) *Wood* v. *Dodgson*, 2 M. & S. 195; *Ex parte Lloyd*, 1 Rose, 4.

(*k*) 6 Geo. 4, c. 16, s. 52; *Ex parte Lloyd*, 1 Rose, 4; *Bassett* v. *Dodgin*, 9 Bing. 653; 2 M. & Scott, 777, S. C.; *Ex parte Yonge* 3 V. & B. 40; 2 Rose, 40, S. C.; *Stedman* v. *Martinnant*, 13 East, 427; *Haigh* v. *Jackson*, 3 M. & W. 598.

(*l*) *Bassett* v. *Dodgin*, 9 Bing. 653; 2 M. & Scott, 777, S. C.

(*m*) *Mead* v. *Braham*, 3 M. & S. 91; *Westcott* v. *Hodges*, 5 B. & Ald. 12; *Walker* v. *Pilbeam*, 4 C. B. 229.

(*n*) *Wood* v. *Dodgson*, 2 M. & Scl. 195; *Haigh* v. *Jackson*, 3 M. & W. 598; *Aflalo* v. *Fourdrinier*, 6 Bing. 806; M. & M. 834, n., S. C.

(*o*) *Stedman* v. *Martinnant*, 13 East, 427.

(*p*) *Clements* v. *Langley*, 5 B.

the certificate (*q*). Payment of a portion of the debt merely in discharge of the surety's personal liability was not a payment within the statute (*r*).

Debts and liabilities, now proveable.

But now by the recent general Bankrupt Act, 32 & 33 Vict. c. 71, s. 31, all debts and liabilities, present or future, certain or contingent, to which the bankrupt is subject at the date of the order of adjudication, or to which he may become subject, during the continuance of the bankruptcy, by reason of any obligation incurred previously to the date of the order of adjudication, are deemed debts proveable in bankruptcy, except demands in the nature of unliquidated damages arising otherwise than from contract, and except where there has been previous notice of an act of bankruptcy.

The value of the contingent debt or liability is to be estimated according to the rules of the court. And if the court deem it incapable of being fairly estimated, then it is not proveable (*s*).

Holder may and must elect between proof and action.

A holder has an election to proceed by proof under the bankruptcy, or by action, but cannot do both; yet he may proceed against some parties to the bill by action, and against others by proof under the bankruptcy; and against the same party he may prove for one debt, and bring his action for another. "It is clear," observes the Court of Common Pleas, "that a creditor has a right to sue for, or to prove each individual debt, as may best suit his purpose" (*t*).

& Ad. 372; 2 N. & M. 269; S. C.; *Wallis* v. *Swinburne*, 17 L. J., Exch. 179; 1 Exch. 203, S. C.; but see the larger provision of 12 & 13 Vict. c. 106, ss. 177, 178. The liability of a surety to his cosurety on a joint and several promissory note is a liability to pay money on a contingency within the meaning of s. 178. *Adkins* v. *Farrington*, 29 L. J., Exch. 345; 5 H. & N. 586, S. C. As to proof of distinct contracts by the same person jointly with others on the same bill of exchange or promissory note, see 24 & 25 Vict. c. 134, s. 152, and *Goldsmid* v. *Cazenove*, 7 H. of L. Cas. 785; 29 Law J., Bank. 17. Unliquidated damages from breach of contract, when proveable, s. 153. See *Green* v. *Bucknell*, 8 Ad. & E. 701; *Rooman* v. *Nash*, 7 B. & C. 145; post, 455.

(*q*) *Vansandau* v. *Corsbie*, 8 Taunt. 550; 2 Moo. 602; S. C., in error, 3 B. & Ald. 13.

(*r*) *Soutten* v. *Soutten*, 5 B. & Ald. 852.

(*s*) Interest is allowed in cases where interest would have been allowed by a jury (s. 36). See post, 455.

(*t*) *Bridget* v. *Mills*, 4 Bing. 18; 12 Moo. 92, S. C.; *Ex parte Grosvenor*, 14 Ves. 588; *Ex parte Glover*, 1 G. & J. 270; *Watson* v. *Medex*, 1 B. & Ald. 121; *Harley* v. *Greenwood*, 5 B. & Ald. 95; 2 D. & R. 337, S. C.; *Mead* v. *Braham*, 3 M. & Sel. 91; *Ex parte Lobbon*, 17 Ves. 334; 1 Rose, 219, S. C.; *Adames* v. *Bridger*, 8 Bing. 314; 1 Moore & S. 438, S. C.; *Ex parte Edward*, 1 Mont. & Mac. 116; 6 Geo. 4, c. 16, s. 59; 12 & 13 Vict.

CHAPTER XXXVI.

But this defence to an action cannot be raised by plea (*t*). The holder may, however, by motion be put to his election, either to stay the action or relinquish his proof.

MUTUAL ACCOMMODATION BILLS.

The principal difficulties as to proof in respect of bills of exchange arise, where there has been mutual accommodation between the bankrupt and other parties.

Mutual accommodation may be either with a specific exchange of securities, or without a specific exchange of securities.

Where there has been a specific exchange of securities.

Mutual accommodation with specific exchange is, where the acceptance of A. is exchanged for the acceptance of B. to the same amount. In this case each party is bound to pay his own acceptance, and, in paying it, is not considered as surety for another. Plaintiff and defendant each drew a bill on the other for the same amount, and each accepted the bill drawn on him without further consideration. Before the bills became due, defendant became bankrupt, having indorsed the bill accepted by the plaintiff to a creditor. The creditor proved the bill under the commission, and then the plaintiff paid the creditor the residue. The plaintiff now sued the defendant on the bill accepted by the defendant. But the Court of Common Pleas were clearly of opinion, that the two bills were mutual engagements, constituting on each side a debt, the one being a consideration for the other. That the bill accepted by the defendant, and on which the plaintiff sued, created an absolute debt from the beginning, which was capable of being proved under the commission, and, being so proveable, was necessarily barred by the certificate (*u*). Three years after, two of the Judges of the Court of King's Bench held the same doctrine. The Peters and the Dunlops had specially exchanged acceptances to the amount of 3,000*l*. Both parties became bankrupt. The Peters and their estate had paid money on their own acceptances, and also on the Dunlops' acceptances. Both parties had obtained their certificates. The action was brought by the assignees of the Peters for money paid against the certificated bankrupts. It was held by Lawrence and Grose, Justices,—First, that for payments on account of the Peters' own acceptances, the Peters' assignees had no remedy, for that the Peters were bound to pay those acceptances: and, secondly, that they could not recover for money paid on the

c. 106, s. 128. This defence, however, cannot be made by plea. *Spencer* v. *Demett*, 1 L. R., Ex. 123.

(*t*) *Spencer* v. *Demmett*, Law Rep., 1 Ex. 123.

(*u*) *Rolfe* v. *Caslon*, 2 H. Bl. 570, anno 1795.

Dunlops' acceptances, for two reasons; because the action should have been brought on the bills, and not on any implied promise, there being an express one; and also because the Dunlops' acceptances were proveable under the Dunlops' commission, and therefore were barred by the certificate (*u*). About four years afterwards, the doctrine of Mr. J. Grose and Mr. J. Lawrence was adopted by the whole Court of King's Bench. Plaintiff and defendants had made specific exchange of bills. Of some of the bills given by defendants to plaintiff, defendants were drawers, of others indorsers. The bills given by defendants to plaintiff were all dishonoured. Defendants became bankrupt. Before their bankruptcy, plaintiff paid money on his own acceptances, for which he had proved under the commission. After the bankruptcy, he paid the residue of the money due on his own acceptances, amounting to 49*l.* 15*s.* 2*d.* This action was brought to recover that sum as money paid. It was held, that plaintiff did not pay his own acceptance as surety; that he had, therefore, no remedy to recover such payments, but that his remedy would have been on the cross bills, had they not been barred by the certificate (*x*).

What amounts to specific exchange.

It is not essential, in order to constitute a specific exchange of securities, that the acceptances given in exchange should be the acceptances of the party giving them, nor that the amounts or dates should be exactly the same (*y*).

Party to mutual specific exchange of paper must pay his own paper before he can prove.

Formerly, a party to a specific exchange of paper was allowed to prove the bankrupt's paper without having paid his own, the dividends being retained until he had paid his own paper (*z*); but now he must, before he can *prove*, take up his own bills, or exonerate the bankrupt's estate from the original debt.

Mutual accommodation without specific exchange.

Mutual accommodation without specific exchange will not create a debt from the acceptor to the drawer. But the acceptor is to be considered as a surety, and may recover what he pays as money paid to the drawer's use.

(*u*) *Cowley* v. *Dunlop*, 7 T. R. 565, anno 1798, Lords Kenyon and Ashhurst, Justices, *dissentientibus*.

(*x*) *Buckler* v. *Buttivant*, 3 East, 73, anno 1802.

(*y*) Ibid.

(*z*) *Ex parte Beaufoy*, Cook's B. Bank. L. 180; *Ex parte Lord Clanricarde*, ibid. 182; *In re Bowness and Padmore*, ibid. 183; *Ex parte Bloxham*, 8 Ves. 531; *Sarratt* v. *Austin*, 4 Taunt. 200; 2 Rose, 112, S. C. See *Ex parte Solarte*, 2 D. & C. 261.

CHAPTER XXXVI.

After holder has proved, no further proof.

If the holder of a bill has proved against the estate of the person for whose accommodation the bill was accepted, there can be no further proof by any one to whom the bill is returned, nor by the accommodation acceptor when he pays it (*a*).

Cases of mutual accommodation without specific exchange, mutual bankruptcy, and cash balance.

The mode of adjusting the accounts between two estates where there had been mutual accommodation paper, a cash balance, and a mutual bankruptcy, has much embarrassed the Courts. Various accommodation transactions had for many years taken place between Caldwell and Co. and the Brownes. The former were the bankers of the latter. A commission of bankruptcy issued against Caldwell and Co., in March, 1793, and in the same month the Brownes became bankrupt. An account was then taken of the mutual debts and credits. That account consisted first of a cash account, which included good bills as well as payments in cash; and, secondly, of a bill account, which related exclusively to bills which had been passed by one house to the other, and which were all ultimately dishonoured. The result was, that on the cash account the Brownes were indebted to Caldwell and Co. in the sum of 40,716*l.*, and that on the bill account Caldwell and Co. had received from the Brownes bad bills to the amount of 305,149*l.* 19*s.* 10*d.*, and the Brownes had received from Caldwell and Co. bad bills to the amount of 204,910*l.* 5*s.* Of the bad bills received from Caldwell and Co., the Brownes had negotiated bills to the amount of 196,589*l.* 6*s.* 4*d.*, and of those received from the Brownes, Caldwell and Co. had negotiated bills to the amount of 126,855*l.* 11*s.* 10*d.*, having retained the residue, *viz.*, 178,294*l.* 8*s.*, at the request of the Brownes. All the bills received by the Brownes were discountable, and upon most of them they had received the full value, and Caldwell and Co. had no consideration for them but the bad bills received from the Brownes. All the bills (or nearly so) which the Brownes had negotiated were proved against the estate of Caldwell and Co., and by far the greater part against the estate of the Brownes also; but to a large amount, *viz.*, 80,000*l.*, the Brownes had deposited bills as a security for payment of a much smaller sum, so that the proof against them in respect of those bills was only for the sum really due, whereas against Caldwell and Co. the proof was for the whole sum payable on the bills; and the consequence of this, and of the unequal negotiation of each other's bills, was that a much larger sum was proved against Caldwell and

(*a*) *Ex parte Read*, 1 G. & J. 224.

In re. Oriental Bank. L. R. 7. Chan Ap. 99
41 L. J. Chan 217.

Co., in respect of bills negotiated by the Brownes than against the latter in respect of bills negotiated by the former. Caldwell and Co., on petition, claimed the right to prove the bills which still remained in their hands, in order to be reimbursed the difference. But Lord Loughborough, C., said, "Till Caldwell and Co. pay all the creditors of Browne, who are likewise creditors of theirs, 20*s.* in the pound, they would be, by proving, sharing with the creditors of Browne, who are likewise creditors of theirs. If I allow this petition, I must do two things that are quite impossible. I must hold that the bankruptcy creates a debt which did not exist antecedently, and I must hold, that the same debt may be proved twice." The proof was confined to the balance of the cash account only (*b*). Where a petition was presented by the assignees of a bankrupt, the object of which was to prove, not only for the cash balance between the two bankrupts' estates, but also in respect of the dishonoured bills, upon an issue of cross paper dishonoured on both sides, part of which having been negotiated, was proved by the holders against both estates, Lord Ellenborough, C., said, "Upon consideration of the case, *Ex parte Walker*, it struck me, that there were but two ways of taking it as between the two estates, either to consider all the bills as struck out of the case entirely, as issued for a bad purpose, like gambling transactions, &c., upon which there could be no proof, or to consider them all as good bills. I do not see that there is a middle course." The order was pronounced, that the petitioners should be at liberty to prove the cash balance only (*c*). In the case of *Ex parte Rawson* (*d*), Lord Eldon said, "I think that I argued the case of *Ex parte Walker*, and I must say, that the speculations about paper certainly outran the grasp of the wits of the courts of justice. This sort of circulating medium puzzled as able a man as ever sat here, Lord Thurlow. I remember the first case of it. It was then small in amount, one bill and another. He then considered the acceptance of the one as a consideration for the other, and allowed both to prove, but then there was this difficulty, that it lessened the fund for paying the holder of the bill, and thus, by proving, they prejudiced their own creditors. It was found this would not do: and then it was said, 'if you will prove, you must first take up your acceptance, which got rid of the objection of the party proving in com-

(*b*) *Ex parte Walker*, 4 Ves. 373.

(*c*) *Ex parte Earle*, 5 Ves. 833.

(*d*) 1 Jacob, 274.

CHAPTER XXXVI.

petition with his own creditor.' Then came those houses at Liverpool and Manchester, drawing on one another to the amount of 50,000*l.* What was to be done then? The Court was puzzled and distressed. At last, however, we came to a sort of anchorage in that case, *Ex parte Walker;* I have no difficulty in saying that I never understood it. I am satisfied, that though no doubt the Court understood that judgment, yet none of the counsel did. The decision was this: that where there are cross bills drawn for accommodation, they are all to be thrown out of the account on both sides, and it is to be taken as if it were a cash balance only. If this were upon the principle that applies to one or two bills, that they are not to be proved by one estate against the other till all the creditors of both are paid, I could understand it. If there be 1,000*l.* of acceptances on the one side, and 10,000*l.* on the other, Lord Loughborough says, that they are not to be regarded at all; that it is all chance how the two estates may pay. I say not; and if there be a surplus of one estate to satisfy the other, why should it not be implied? Look at the case of partnership; a partner cannot prove against the estate of his co-partner, so as to affect the creditors of both, but he may be paid his demand out of the surplus, if there is any. I do not see why the same rule is not to be applied here. I cannot bring myself to think that the case of *Ex parte Walker* is right, if there is a surplus." In the following case there were no cross bills, but dishonoured bills on one side were struck out of the account. Palmer received from Williamson, in cash and bills, 6,424*l.* 9*s.* 3*d.*, and Williamson received from Palmer, in cash, 5,824*l.* 19*s.* 7*d.* Both became bankrupt. Palmer had negotiated the bills, some of which, drawn by Williamson, to the amount of 1,098*l.* were refused acceptance, and were proved under both commissions. Palmer's assignees contended that 1,098*l.* should be deducted from the 6,424*l.* 9*s.* 3*d.*, which would reduce the sum received by him, and would leave a balance of 498*l.* 10*s.* 4*d.* in his favour, which they petitioned to be allowed to prove against Williamson's estate. Lord Eldon, C., after considering how the question would stand in case the parties had not become bankrupt, said, "If between these parties considered as solvent, Williamson is entitled to say Palmer should not have the 498*l.*, until he had restored the bill, being put into his hands as a medium of raising money, and the first obligation was upon Palmer, what difference does the bankruptcy make? No other difference than this, that the assignees of Williamson protect his estate against any liability upon the bill. Palmer's estate is entitled to a dividend

upon the sum of 498*l.*, that is, in order to keep the account finally right. Williamson's estate is entitled to retain the dividends due to Palmer's estate, to the extent of making them applicable to protect the estate of Williamson against the bill." "To alter this decision," added his Lordship, "it must be shown, not only that the bills were accepted by Goodenough (the drawee), but that they were accepted on account of what the acceptor owed to Williamson (*e*). At the time of the bankruptcy of Lynn, the account between him and the petitioner Read stood thus:—there was a cash balance of 3,576*l.* 8*s.* 4*d.*, including therein a sum of 1,603*l.* 17*s.* 5*d.* for premiums of insurance, and commission due from Lynn to Read, and Lynn had given his promissory note for the said sum of 1,603*l.* 17*s.* 5*d.* to Read, who had negotiated it, and it was proved under the commission. Read had accepted, for the accommodation of Lynn, bills drawn by Lynn to the amount of 6,444*l.* 7*s.* 4*d.*, none of which had been paid at the bankruptcy, and they were proved under the commission. Read had likewise guaranteed debts of Lynn to the amount of 773*l.* 1*s.* 5*d.*, but had not at the bankruptcy paid any part of those debts, and they were proved under the commission. Lynn had given three bills for 1,000*l.* each, drawn by him on Stalker, to Read, who had negotiated them, and those bills were dishonoured, and two of them were proved. The petitioner being insolvent, made a composition, and paid the holders of the bills accepted for Lynn's accommodation, and the parties whose debts were guaranteed, a composition, amounting to 4,894*l.* 8*s.* 8*d.* The petition prayed that the unpaid bills or liabilities might be excluded from both sides of the account, or that the petitioner might debit Lynn's account with the cash balance of 3,576*l.* 8*s.* 4*d.*, and with the balance or difference between the amount of dividends paid by Lynn's estate upon Stalker's bills and Lynn's promissory note, and the amount of the commission paid by the petitioner, and that he might be admitted to prove the balance of the account, according to the declaration of the Court." Sir John Leach, V.-C., "It is not necessary to refer to *Ex parte Walker* and *Ex parte Earle* (*f*), inasmuch as the act of 49 Geo. 3, has introduced a new principle, by which cases of this sort must now be tried. By this act, a surety paying after the bankruptcy can only prove against the estate of the bankrupt where the creditor has not proved, or stand in the place of the creditor on the bankrupt's estate, where the creditor has proved, and there cannot be double proof. Let the case of the accom-

(*e*) *Ex parte Metcalfe*, 11 Ves. 404. (*f*) See supra.

CHAPTER XXXVI.

modation bills be first tried by this principle. Read accepts, for the accommodation of the bankrupt, bills to the amount of 6,444*l.*, which remains wholly unpaid at the time of the bankruptcy. These bills are all proved by the holders, under the commission, and, if Read were now to pay these bills, it would form no ground of further proof, and all that Read could claim would be, to have the benefit of the proofs already made upon these bills against the estate. With respect to the cash balance, that part of it which is represented by the promissory note of 1,603*l.* is already proved against the estate by the holder of the note, with whom the petitioner had discounted it and the actual payment by the petitioner could not give him a larger right than to have the benefit of that proof. The remainder of the cash balance is more than covered by the two bills of Stalker, which have been proved against the bankrupt's estate by the holders with whom the petitioner negotiated them. It is hardly necessary to refer to the debts, amounting to 773*l.*, which were guaranteed by the petitioner, but which have been proved by the creditors against the bankrupt's estate." Petition dismissed (*g*). The latest case upon this intricate subject is *Ex parte La Foreste* (*h*), in which there was a cash balance between two bankrupt houses, and an account of mutual accommodation bills dishonoured. And the cash balance alone was admitted to be proved. And it was said, that Lord Eldon's dissatisfaction to *Ex parte Walker* applied only in case there was a surplus of the estates: in which case, as between two partners after payment of the common creditors of both, the equities of the houses should be adjusted out of the surplus estate. This decision was appealed from, but on account of the small amount of the estate the appeal was not prosecuted, and the cases seem still very confused.

Perhaps the result is, that when the bills remain in the hands of the bankrupts, the cash balance is the debt, but when they have been negotiated the doctrine in *Ex parte Read* applies (*i*).

Accommodation bills in the hands of an indorsee for value.

When accommodation bills are in the hands of a third party, for a valuable consideration, he may prove the whole of each bill upon the estate of each of the parties to it, and receive dividends as far as the amount due to him (*j*).

(*g*) *Ex parte Read*, 1 G. & J. 224.

(*h*) 2 D. & C. 199; 1 M. & B. 363, S. C.

(*i*) See, however, the new enactment, 32 & 33 Vict. c. 71, s. 31.

(*j*) *Ex parte King*, Cook's B. L. 177; *Ex parte Lee*, 1 P. Wms. 782; *Ex parte Crossley*, 3 Bro.

Proof for interest.

Before the 6 Geo. 4, c. 16, interest on a bill was not proveable unless payable on the face of it (*k*), and no interest after the act of bankruptcy could be proved at all (*l*). But that act (*m*) enabled the holder to prove, on overdue bills or notes, for interest down to the date of the fiat at the rate usually allowed by the Court of Queen's Bench (*n*). The late general act, 12 & 13 Vict. c. 106, s. 180, allowed interest at 4*l.* per cent. down to the time of filing the petition. By the last general act, 32 & 33 Vict. c. 71, s. 36, such interest is allowed as a jury might have allowed.

Assignees' claim for interest.

The assignees may recover interest when they are plaintiffs in an action as if no bankruptcy had happened (*o*).

Expenses, re-exchange, &c.

Other expenses, such as protesting, re-exchange, &c., if recoverable in an action, are proveable (*p*).

Where there are several adjudications, under which, and for how much, the holder may prove.

Under separate adjudications of bankruptcy against different parties to a bill or note, the holder may prove the whole amount of the money due to him upon the bill or note, at the time he makes his proof, and receive dividends under each upon the sums proved, until he shall, together, have received the whole amount. "In cases of bills or notes," says Lord Hardwicke, "where there is a drawer, and, perhaps, several indorsers, suppose two of these persons become bankrupts, the holder may prove his whole debt under each commission, and is entitled to receive satisfaction out of both estates, according to the dividends to be made, until he has received satisfaction for his whole debt; for he has a double security, and it is neither law nor equity to take it from him. But if, before the bankruptcy of one, or before the proof is tendered, he had received payment of part from the other, he could only have proved the residue under the latter bankruptcy, as the form of proving his debt

237; *Ex parte Bloxham*, 6 Ves. 449, 600; 8 Ves. 531; *Fentum* v. *Pocock*, 5 Taunt. 192; 1 Marsh, 14, S. C.; *Jones* v. *Hibbert*, 2 Stark. 304; *Bank of Ireland* v. *Beresford*, 6 Dow. 233.

(*k*) *Ex parte Marlar*, 1 Atk. 150.

(*l*) *Ex parte Moore*, 2 Bro. C. C. 597.

(*m*) Sect. 57.

(*n*) As to subsequent interest while there was a surplus, see 13 Ves. 573; *Ex parte Higginbotham; Ex parte Paton*, 1 G. & J. 332.

(*o*) *Pott* v. *Beavan*, 7 M. & G. 604.

(*p*) *Anon.* 1 Atk. 140; *Ex parte Moore*, 2 Bro. C. C. 597; *Ex parte Hoffman*, Co. B. L. 194; *Francis* v. *Rucker*, Ambler, 672. In the first and last of these cases, the expenses had been incurred after the act of bankruptcy and before the commission.

CHAPTER XXXVI.

shows, because no more would remain due to him" (*q*). And not only if any part of a bill have been received by the holder, before he have actually proved it upon the estate of a party, but even if a dividend under another commission have been merely *declared*, he can only prove for the residue (*r*).

Proof against joint and separate estate.

Where the creditor knowingly holds the joint and separate security of partners for the same debt (*s*), he could not in general prove both on the joint and separate estate (*t*). The application of this rule to bills on which there were the names of two firms, in which firms were common partners, was involved in great uncertainty (*u*). Upon principle it should seem that in such cases there should be double proof. Accordingly by statute 32 & 33 Vict. c. 71, s. 37, repealing a somewhat similar enactment in the 24 & 25 Vict. c. 134, s. 152, it is enacted, "If any bankrupt is, at the time of adjudication, liable in respect of distinct contracts as member of two or more distinct firms, or as a sole contractor and also as the member of a firm, the circumstance that such firms are in whole or in part composed of the same individuals, or that the sole contractor is also one of the joint contractors, shall not prevent proof in respect of such contracts against the properties respectively liable upon such contracts" (*v*).

Where a creditor holds bills as a security.

Where a creditor proves a debt, and holds certain bills of exchange or promissory notes, as securities, if any of them be afterwards paid to him, the amount of such payment must be expunged from the proof, and the future dividends will be paid on the residue only (*w*).

(*q*) *Ex parte Wildman*, 1 Atk. 109; 2 Ves. 113, S. C.; *Ex parte Par*, 11 Ves. 65; 1 Rose, 76, S. C.; *Ex parte Tayler*, 1 De G. & J. 112; 26 L. J., Bank. 58.

(*r*) *Cooper* v. *Pepys*, 1 Atk. 106; *Ex parte Leers*, 6 Ves. 644; *Ex parte The Royal Bank of Scotland*, 19 Ves. 310; *Ex parte Worrall*, 1 Cox, 309; see, however, *In re Gibson and Johnson*, cited 19 Ves. 311, and *Ex parte De Tastet*, 1 Rose, 16.

(*s*) *Ex parte Henton*, De Gex, 550.

(*t*) See the judgment of Lord Justice Turner in *Ex parte Goldsmith*, 25 L. J., Bank. 26. But see also *Ex parte Thornton*, 28 L. J., Bank. 4, where double proof was allowed, and it was said that the rule against it is a technical rule not to be extended.

(*u*) See the authorities collected in *Ex parte Goldsmid*, 25 L. J., Bank. 25; 1 De G. & J. 257, S. C.

(*v*) *Ex parte Smith*, Cook's B. L. 175, 191; *Ex parte Barratt*, 1 Glyn & J. 327; *Ex parte Bloxham*, Cook's B. L. 176; *Ex parte Burn*, 2 Rose, 55; *Ex parte Rufford*, 1 G. & J. 41. See further, as to the mode of dealing with bills which have been deposited as a security, *Ex parte Baldwin*, 19

Where creditor holds a bill as security.

Where a creditor holds a bill as a security for a smaller sum than the amount of the bill, he may prove against any parties to the bill (except against the party who deposited the bill with him) for the whole amount of the bill, provided he do not receive more than twenty shillings in the pound on the debt due to him from the depositor of the bill (*x*).

Proof of bill acquired after acceptor's bankruptcy.

A holder who has bought up the notes or acceptances of the bankrupt after the bankruptcy will be admitted to prove (*y*), provided that, at the time of the bankruptcy, they were in the hand of a person entitled to prove (*z*).

Acts of bankruptcy in respect of bills.

If a trader deny himself to the holder of a bill on the morning of the day when it is payable, though the trader pay it the same day, that is an act of bankruptcy (*a*).

A bill of exchange is a chattel, the fraudulent transfer of which was an act of bankruptcy within the 6 Geo. 4, c. 16, s. 3 (*b*), and within the 12 & 13 Vict. c. 106, s. 67; and a fraudulent transfer of a bill of exchange is also clearly an act of bankruptcy within the recent act, 32 & 33 Vict. c. 71, s. 6.

When a bill may be a good petitioning creditor's debt.

A bill of exchange may be a good petitioning creditor's debt, though it be not due, and that against the drawer, though, after the bankruptcy, it be duly presented and paid by the acceptor (*c*). Interest cannot be reckoned, for this purpose, as part of the debt, unless made payable on the face of the bill (*d*).

Ves. 230; *Ex parte Towgood*, 19 Ves. 229; *Ex parte Rushworth*, 10 Ves. 419; *Ex parte Rufford*, 1 G. & J. 41; *Ex parte Brown*, 1 G. & J. 407. As to proof by one partner against the estate of his co-partner for any debt in respect of the partnership, see *Ex parte Maude*, 2 Chan. App. L. Rep. 550.

(*x*) *Ex parte King*, Co. B. L. 177; *Ex parte Crossley*, 3 Bro. C. C. 237; Co. B. L. 177, S. C.; *Ex parte Blowham*, 5 Ves. 499; see *Ex parte Reader*, Buck. 381; *Ex parte Philips*, 1 M., D. & D. 232.

(*y*) *Ex parte Lee*, 1 P. Wms. 782; *Ex parte Atkins*, Buck. 479; *Ex parte Deey*, 2 Cov. 423; *Ex parte Brymer*, Co. B. L. 187; *Ex parte Thomas*, 1 Atk. 73; *Joseph* v. *Orme*, 2 N. R. 180; *Mead* v. *Braham*, 3 M. & Sel. 91; *Cowley* v. *Dunlop*, 7 T. R. 565; *Houle* v. *Baxter*, 4 East, 177.

(*z*) *Ex parte Rogers*, Buck. 490; see *Ex parte Dickinson*, 3 D. & C. 520; *Ex parte Bolton*, 1 M. & Bli. 412. See the Chapter on TRANSFER.

(*a*) *Colkett* v. *Freeman*, 2 T. R. 59; and see *Bleasby* v. *Crossley*, 2 C. & P. 213.

(*b*) *Cumming* v. *Baily*, 6 Bing. 363; 4 Moo. & P. 36, S. C.

(*c*) *Ex parte Douthat*, 4 B. & Ald. 67; and see 32 & 33 Vict. c. 71, s. 31. But a bill at maturity must be presented, and due notice given to the drawer, or it will not constitute a good petitioning creditor's debt against him. *Cooper* v. *Machin*, 1 Bing. 426; 8 Moo. 536, S. C.

(*d*) *Cameron* v. *Smith*, 2 B. & Ald. 305; *In re Burgess*, 8 Taunt. 660; 2 Moo. 745; Buck. 412.

CHAPTER XXXVI

Though a bill be for the exact sum of 50*l.*, and not due at the time of the act of bankruptcy, the rebate of interest will not make it an insufficient petitioning creditor's debt (*f*).

Where there is a specific exchange of accommodation acceptances, and before the bills are at maturity one of the parties commits an act of bankruptcy, it has been held that the bankrupt's acceptance is not a sufficient debt to support a commission, until the petitioning creditor has paid his own acceptance (*g*). Where an acceptor, for the accommodation of the bankrupt before an act of bankruptcy, paid the amount after an act of bankruptcy, it was formerly held, that this payment, being after an act of bankruptcy, did not support the commission (*h*). A bill or note which could not be sued on at law (*i*), or against law proceedings on which equity will enjoin, is not a good petitioning creditor's debt (*k*).

It was at one time doubtful whether, if a bill existing before the act of bankruptcy were indorsed to the petitioning creditor, after the act of bankruptcy, the indorsee would be entitled to a commission (*l*). But it is now clear, that before the late statute 32 & 33 Vict. c. 71, s. 6. such a debt was sufficient. The debt on which the fiat was issued must have existed before the act of bankruptcy, but need not have existed in the petitioning creditor before it; the indorsee represents his indorser (*m*). But it must appear that there was a good petitioning creditor's *debt in the petitioner* at the time of the petition, and therefore it must be shown that

(*f*) *Brett* v. *Levett*, 13 East, 213; 1 Rose, 112, S. C.

(*g*) *Sarratt* v. *Austin*, 4 Taunt. 200; 2 Rose, 112, S. C.

(*h*) *Ex parte Holding*, 1 G. & J. 97. But see now 32 & 33 Vict. c. 71, s. 31.

(*i*) *Richmond* v. *Heapy*, 1 Stark. 202; *Buckland* v. *Newsame*, 1 Taunt. 477; 1 Camp. 474, S. C. But see now 32 & 33 Vict. c. 71, s. 31.

(*k*) *Ex parte Page*, 1 G. & J. 100.

(*l*) *Ex parte Lee*, 1 P. Wms. 782.

(*m*) *Ex parte Thomas*, 1 Atk. 73; *Anon.* 2 Wils. 135; *Bingley* v. *Maddison*, 1 Co. B. L. 32; *Glaister* v. *Hewer*, 7 T. R. 498. Before the year 1806, the petitioning creditor's debt must have existed before *any act* of bankruptcy, on the principle that a man who has committed an act of bankruptcy has no power to contract so as to bind his estate. But it was provided by the 46 Geo. 3, c. 135, s. 5, that the commission should not be defeated by an act of bankruptcy prior to the petitioning creditor's debt, of which act of bankruptcy the petitioning creditor had no notice. That statute is repealed by the 6 Geo. 4, c. 16; the 19th section of which latter act, and the 12 & 13 Vict. c. 106, s. 88, provides that no commission shall be invalidated by any act of bankruptcy prior to the petitioning creditor's debt, provided there be a sufficient act of bankruptcy after it.

According, therefore, to the latter statute, notice to the petitioning creditor of the prior act of bankruptcy is in many cases immaterial.

the bill or note was indorsed to the petitioner before he petitioned (*n*). If, at the time of the act of bankruptcy and at the time of the petition, a bill given to a creditor were outstanding in the hands of an indorsee, neither the original debt due to the creditor, nor the bill, will enable the original creditor to support a petition (*o*). When a bill or note is given to the wife *dum sola*, the husband alone may petition (*p*). The petitioning creditor's debt must in all cases, before the recent acts, 24 & 25 Vict. c. 134, and 32 & 33 Vict. c. 71, have been contracted, or must have existed, while the bankrupt was a trader (*q*). But this necessity no longer remains.

Evidence of the date of a bill.

The date appearing on the bill has been held *primâ facie* evidence that it existed before the act of bankruptcy (*r*). But when, in an action by assignees of a bankrupt, they produce a bill or note of the bankrupt as evidence of a petitioning creditor's debt, they must show by extrinsic evidence that the instrument existed before the act of bankruptcy (*s*). From the date of the drawing or making the date of an indorsement cannot be inferred (*t*).

Distinction between traders and non-traders.

Though the distinction between trader and non-trader has been for many purposes abolished, yet for some purposes it still exists (*u*).

What transactions, in respect of bills, will constitute a trading within the Bankrupt Laws.

A course of drawing and redrawing bills of exchange for the sake of the profit, is a trading within the Bankrupt Laws. Thus, where A. was agent for several regiments for the space of six years, and drew bills upon B., who was likewise an agent in Dublin, to the amount of 281,000*l.* and upwards, and B. redrew to the amount of 290,000*l.* and upwards on A., but there was no commission money allowed

(*n*) *Rose* v. *Roworoft*, 4 Camp. 245.

(*o*) *Ex parte Botten*, 1 Mont. & Bl. 412; *Ex parte Magnus*, 11 L. J., Bank. 32.

(*p*) *Ex parte Barber*, 1 G. & J. 1; *M'Neilage* v. *Holloway*, 1 B. & Ald. 218.

(*q*) *Bailie* v. *Grant*, 9 Bing. 121.

(*r*) See ante, Chapter on EVIDENCE; *Goodtitle* v. *Milburn*, 2 M. & W. 853; *Sinclair* v. *Baggaley*, 4 M. & W. 312; *Smith* v. *Battens*, 1 Mood. & R. 341; *Taylor* v. *Kinloch*, 1 Stark. 175; *Obbard* v. *Betham*, M. & M. 483; *Potez* v. *Glossop*, 2 Exch. 195; *Davis* v. *Lowndes*, 7 Scott, N. R. 195; *Malpas* v. *Clements*, 19 L. J., Q. B. 435.

(*s*) *Wright* v. *Lainson*, 2 M. & W. 739; 6 Dowl. 146, S. C.; and see *Anderson* v. *Weston*, 6 Bing. N. C. 296; 8 Scott, 583, S. C.; *Fletcher* v. *Manning*, 12 M. & W. 571.

(*t*) *Rose* v. *Roworoft*, 4 Camp. 245; *Cowie* v. *Harris*, M. & M. 141.

(*u*) See 32 & 33 Vict. c. 71, ss. 6, 15, 95.

CHAPTER XXXVI.

on either side, it was held that a drawing and redrawing such large sums, and a continuation of it, was a trading, though no commission money was allowed on either side, and notwithstanding a loss ensued by these transactions to the bankrupt (*t*). But the mere circumstance of drawing, accepting, or indorsing bills, or even an *occasional* drawing or redrawing, for the sake of profit, will not make a man a trader (*u*) within the Bankrupt Laws.

REPUTED OWNERSHIP.

The Bankrupt Act, 12 & 13 Vict. c. 106, s. 125, now repealed, following a series of statutes from the time of James I. enacted, that if at the time of the bankruptcy the bankrupt have by the consent of the true owner, in his possession, order, or disposition, any goods or chattels whereof he was reputed owner, or whereof he had taken upon himself the sale, alteration, or disposition as owner, the Court shall have power to order them (*v*) to be sold for the benefit of the creditors.

Debts formerly within it.

This section applied not only to things in possession but to things in action, as bonds, policies, and other debts (*w*).

The share of a dormant partner does not pass to the trustee in bankruptcy under the reputed ownership clause (*x*). But the claim of a lender who is to have a share of the profits, and who would formerly have been deemed a dormant partner, is postponed to the claims of other creditors, where the debtor becomes bankrupt, or dies in insolvent circumstances (*y*).

Existing enactment confined to traders and trade debts.

The recent statute 32 & 33 Vict. c. 71, repealing all former provisions on the subject, confines the doctrine of reputed ownership to bankrupts, being traders (*z*).

It further takes out of the operation of the clause all things in action, except debts due to the bankrupt in the course of his trade.

Where a creditor assigns a trade debt not assignable at

(*t*) *Richardson* v. *Bradshaw*, 1 Atk. 128; *Hankey* v. *Jones*, Cowp. 745; 1 Mont. 22; and see *Inglis* v. *Grant*, 5 T. R. 530, and *Ex parte Bell*, 15 Ves. 356.

(*u*) *Hankey* v. *Jones*, Cowp. 745; see *Hamson* v. *Harrison*, 2 Esp. 555.

(*v*) The alteration in the wording of this section first introduced the necessity of an order. But no reference to the necessity of any order appears in the existing enactment, 32 & 33 Vict. c. 71, s. 15; and therefore, it is conceived, the old law is restored in this respect, and that no order is now required.

(*w*) *Ryall* v. *Rolle*, 1 Ves. 348; 1 Atk. 165, S. C.

(*x*) *Reynolds* v. *Bowley*, 2 Law Rep., Q. B. 474.

(*y*) 28 & 29 Vict. c. 86, s. 5.

(*z*) Sect. 15.

law, and then becomes a bankrupt, the general rule is that the debt so assigned passes nevertheless to the assignees in bankruptcy, as being in the order and disposition of the bankrupt with the consent of the true owner, unless the debtor have had notice of the assignment. It is, however, sufficient if the assignee of the debt do all he can to give notice, or dispatch a notice, before the bankruptcy, though it be not received by the debtor till after the bankruptcy (*a*). It has been held that a debt in order to pass to the assignees within this section must have been *unconscientiously* allowed to remain in the disposition of the bankrupt (*b*).

The debtor's knowledge of the assignment is not necessary where a negotiable bill or note is indorsed or transferred, for the legal title to the debt is conveyed by the indorsement or delivery. But if a trader who afterwards becomes bankrupt, indorses a bill or note not negotiable, unless the debtor have had notice, the bill or note passes to the bankrupt's assignees by reputed ownership (*c*).

Bills and notes within it.

Bills or notes may pass to the assignees of a trader under the clause of reputed ownership (*d*). A person having three bills of exchange, applied to a country banker, with whom he had had no previous dealings, to give for them a bill on London for the same amount; and the bill given by the banker was afterwards dishonoured:—held, that this was a complete exchange of securities, and that trover would not lie for the three bills of exchange; and that *if the exchange had not been complete*, still that, the banker having become a bankrupt, and the three bills having come to the possession of his assignees, *must be considered as goods and chattels in the order and disposition of the bankrupt, at the time of the bankruptcy, within the meaning of the Bankrupt Act.* "These bills," says Abbott, C. J., "being negotiable securities, of which the bankrupts might dispose, and having remained in their possession till the time of the bankruptcy, and so come to their assignees, are, in my opinion, within the operation of the statute. It has been held that *debts* are within the statute; if so, *à fortiori*, bills of exchange must be" (*e*).

(*a*) *Belcher* v. *Bellamy*, 17 L. J., Exch. 219; 2 Exch. 303, S. C. See *Brewin* v. *Short*, 5 E. & B. 227; 24 L. J., Q. B. 297, S. C.

(*b*) See *Joy* v. *Campbell*, 1 Sch. & Lef. 336, and *Load* v. *Green*, 15 M. & W. 216; *Hamilton* v. *Bell*, 10 Exch. 545.

(*c*) *Belcher* v. *Campbell*, 8 Q. B. 1.

(*d*) 12 & 13 Vict. c. 106, s. 125.

(*e*) *Hornblower* v. *Proud*, 2 B. & Ald. 327. See *Bryson* v. *Wylie*, 1 B. & P. 83, n. As to accommodation bills in the hands of the party for whose accommodation they were accepted, see *Wallace* v. *Hardacre*, 1 Camp. 46.

CHAPTER XXXVI.

But a bill or note in the hands of an agent for a specific purpose does not pass to his assignees by reputed ownership (*f*).

Bills in the hands of an agent, factor or banker becoming bankrupt, do not pass to his assignees.

Bills remitted to an agent as a factor or banker, and entered short while unpaid, or paid in generally, for the amount to be received (*g*) by such banker, or for any other specific purpose (*h*), and not discounted or treated as cash, are considered as still in the possession of the principal; and, therefore, in case of the bankruptcy of such agent, banker or factor, they do not pass to his assignees, but must be returned to the principal, subject to such lien as the agent may have upon them. "Every man," says Lord Ellenborough, "who pays bills not due into the hands of his banker, places them there, as in the hands of his agent to obtain payment of them when due. If the banker discount the bill, or advance money upon the credit of it, that alters the case, he then acquires the entire property in it, or has a lien on it, *pro tanto*, for his advance" (*i*).

And the law is the same though the amount of the bills be entered by the banker in the cash column of the ledger and pass-book, and though the banker pay them away or discount them at his discretion.

A customer was in the habit of indorsing and paying into his banker's hands bills not due, which, if approved, were immediately entered as bills to his credit, to the full amount: and he was then at liberty to draw for that amount by checks on the bank. The customer was charged with interest upon all cash payments to him, from the time when made, and upon all payments by bills from the time when they were due and paid, and had credit for interest upon cash paid into the bank from the time of the payment, and upon bills paid in from the time when the amount of them was received. The bankers paid away such bills to their customers as they

(*f*) *Bruce* v. *Hurly*, 1 Stark. 23; *Belcher* v. *Campbell*, 8 Q. B. 1; see *Took* v. *Hollingworth*, 5 T. R. 215.

(*g*) See *Jombart* v. *Woollett*, 2 M. & C. 389; *Ex parte Edwards*, 11 L. J., Bank. 36.

(*h*) *Belcher* v. *Campbell*, 8 Q. B. 11.

(*i*) *Giles* v. *Perkins*, 9 East, 12; see *Ex parte Dumas*, 1 Atk. 232; 2 Ves. sen. 582, S. C.; *Zinck* v. *Waller*, 2 W. Bl. 1154; *Bolton* v. *Puller*, 1 B. & P. 539; *Ex parte Sargeant*, 1 Rose, 153; *Ex parte Sollers*, 18 Ves. 229, S. P.; *Ex parte Pease*, 1 Rose, 232; *Ex parte Wakefield Bank*, 1 Rose, 242; *Carstairs* v. *Bates*, 3 Camp. 301; *Ex parte M'Gae*, 2 Rose, 376; *Ex parte The Leeds Bank*, 1 Rose, 254; 19 Ves. 25, S. C.; *Ex parte Rowton*, 17 Ves. 426; 1 Rose, 15, S. C.; *Ex parte Buchanan*, 1 Rose, 280; 2 Rose, 162; *Ex parte Waring*, 2 Rose, 182.

thought fit. The bankers having become bankrupts, it was held, that the customer might maintain trover against their assignees for bills paid in by him, and remaining *in specie* in their hands, the cash balance, independently of the bills, being in favour of the customer at the time of the bankruptcy; Bayley, J., observing, "It has been argued for the defendants, that we must infer an agreement to have been made between the banker and his customer, that, as soon as bills reached the hands of the banker, the property should be changed. Undoubtedly, if there were any such bargain, the defendants would be entitled to our judgment; but if there be no such bargain, then the case of customer and banker resembles that of principal and factor; and the bills remaining in the banker's hands *in specie*, will, notwithstanding the bankruptcy of the banker, continue the property of the customer. Though the amount of the bills was carried into the cash column, it does not follow that the customer assented to their being considered as cash" (*j*). The assignees may be restrained by injunction from negotiating the bills (*k*).

DEPOSITED SECURITIES.

Holder's right to the benefit of security in the event of bankruptcy.

When and to what extent securities in the hands of an acceptor who afterwards becomes bankrupt are available in favour of the holder of the bill is a question involving many difficulties, and it has accordingly given occasion to much discussion.

These questions can seldom arise, except when both drawer and acceptor are insolvent, for it is a matter of indifference to the bill holder from what parties or funds he receives payment (*l*).

Holder's right to securities deposited with acceptor.

The general rule of law, as established by recent decisions, seems to be, that when both the drawer and the acceptor of a bill become bankrupt, and bills, securities or funds have been remitted by the drawer to the acceptor, and specifically appropriated to cover the acceptor's liability on his acceptance, the holder of the bill may avail himself of them; they do not belong to the acceptor's general creditors, and do not pass to his assignees or trustee in bankruptcy.

(*j*) *Thompson* v. *Giles*, 2 B. & C. 422; 3 Dowl. & R. 733, S. C.; *Ex parte Barkworth*, 27 L. J., Bank. 5.

(*k*) The share of a dormant trading partner is not, as we have seen, in the order and disposition of his co-partner within the statute. *Ex parte Jombart*, Cor. Vice C., Dec. 1836; *Reynolds* v. *Bewley*, in error, 2 L. R., Q. B. 474.

(*l*) The original and leading case on the subject is *Ex parte Waring*, 19 Ves. 345, the complicated facts of that case, so far as they are material to the question now under consideration, are clearly stated by the Master of the Rolls in *New Zealand Banking Company*, 4 Law Rep., Eq. 26.

CHAPTER XXXVI.

Although this principle applies most frequently in the case of actual bankruptcy, yet it is not essential to its application that the insolvency should have been judicially ascertained by an adjudication in bankruptcy. It is enough if the parties are practically insolvent (*g*).

Holder's right to funds deposited with a third person.

Where the customer of a banker had lodged a sum of money with a bank to meet an acceptance, and the acceptor failed before its maturity, it was held that at law the drawer could not maintain an action against the banker, there having been no privity of contract between him and the banker (*h*). And a similar case (*i*), the Vice-Chancellor followed the law, and held there was no equity in favour of the drawer.

Holder's right to acceptor's guarantee.

The acceptor's right to the benefit of a guarantee given to him is not transferred to a holder of the bill (*k*) unless the guarantee be given for the purpose of being exhibited to other parties (*l*).

Transfer in case of bankruptcy of holder.

If the holder of a bill of exchange, in which he has a beneficial interest, become bankrupt, the property in the bill vests, from the time of the act of bankruptcy (*m*), in his assignees, and they must indorse (*n*).

Where the bankrupt is a trustee.

But as, in general, property, in which a bankrupt has no *beneficial interest*, does not pass to his assignees: he may, after an act of bankruptcy, indorse a bill accepted for his accommodation, so as to convey to his indorsee a right of action against the accommodation acceptor (*o*).

When the transfer of a bill by a bankrupt is payment.

But, if the money were received by the creditor before the commission issued, then an indorsement by the bankrupt would, under the late General Bankrupt Act, have been protected as a payment by the bankrupt (*p*). "There is no

(*g*) *Powles* v. *Hargreaves*, 3 De G., M. & G. 430.

(*h*) *Moore* v. *Bushell*, 27 L. J., Exch. 3. See *Farley* v. *Turner*, 26 L. J., Chan. 710.

(*i*) *Hill* v. *Royds*, 8 L. J., Eq. 290.

(*k*) *Ex parte Stephens*, 3 Cha. App. 477.

(*l*) *In re Agra and Masterman's Bank*, 3 Cha. App. 756.

(*m*) Subject of course to the provisions as to notice of the act of bankruptcy.

(*n*) *Pinkerton* v. *Marshall*, 2 H. Bl. 335; *Thomason* v. *Frere*, 10 East, 418; but see now 2 & 3 Vict. c. 29, and 12 & 13 Vict. c. 106, s. 133.

(*o*) *Arden* v. *Watkins*, 3 East, 317; *Wallace* v. *Hardacre*, 1 Camp. 45; *Ramsbottom* v. *Cator*, 1 Stark. 228.

(*p*) 6 Geo. 4, c. 16, s. 82; and also under 2 & 3 Vict. c. 29, and 12 & 13 Vict. c. 106, s. 133.

difference," says the Lord Chancellor, "between an actual payment of money in satisfaction of a debt, and indorsing bills of exchange, provided the money was received on them before the commission of bankruptcy issued; for I should take that only as a medium of payment, and no more; otherwise it would be very hard" (*q*). And it has been held, that if a bill of exchange be indorsed in payment of *goods sold*, it will be a payment within the statute, though the bill be not paid till after the issuing of the commission, provided it be paid when due (*r*).

The distinction between a payment in money and a payment or satisfaction by bills, is, however, at this day, of less moment, since now not only payments, but all contracts, dealings and transactions with a bankrupt, without notice of an act of bankruptcy available for adjudication, are protected (*s*).

Transfer to a bankrupt.

Where a negotiable instrument is given to the bankrupt after his bankruptcy, the bankrupt has the property in it, unless the assignees choose to interfere (*t*).

When his capacity admitted.

If a man already bankrupt be payee of a negotiable bill or note, the acceptor or maker cannot dispute the payee's capacity to indorse (*u*).

Bill or note for debt barred by certificate or order of discharge.

The former certificate or present order of discharge of the bankrupt discharges him from all debts due when he became bankrupt, and from all claims and demands proveable under the bankruptcy (*x*). And an agreement to pay a debt from which the bankrupt has been so discharged, was formerly void, unless in writing and signed (*y*). But an absolute written and signed promise personally to pay, bound, whether given before or after certificate (*z*). But a subsequent contract to pay was afterwards by the 24 & 25 Vict. c. 134,

(*q*) *Hawkins* v. *Penfold*, 2 Ves. sen. 550.

(*r*) *Wilkins* v. *Casey*, 7 T. R. 711; *Bayly* v. *Schofield*, 1 M. & Sel. 338; see *Bishop* v. *Crawshay*, 3 B. & C. 415; 5 Dowl. & R. 279.

(*s*) 12 & 13 Vict. c. 106, s. 133. This act is now repealed, but the new statute 32 & 33 Vict. c. 71, s. 94, contains the provision in the text.

(*t*) *Drayton* v. *Dale*, 2 B. & C. 293; 3 Dowl. & R. 534.

(*u*) *Drayton* v. *Dale*, 2 B. & C. 293; *Pitt* v. *Chappelow*, 8 M. & W. 616; *Braithwaite* v. *Gardiner*, 8 Q. B. 473. See the Chapter on ACCEPTANCE.

(*x*) 12 & 13 Vict. c. 106, s. 200, repealed and re-enacted by 32 & 33 Vict. c. 71, s. 49.

(*y*) 6 Geo. 4, c. 16, s. 131.

(*z*) *Kirkpatrick* v. *Tattersall*, 13 M. & W. 766; *Lobb* v. *Stanley*, 5 Q. B. 574.

CHAPTER XXXVI

s. 164, avoided (*a*). That act, however, is now repealed *in toto* by 32 & 33 Vict. c. 83.

FRAUDULENT PREFERENCE.

Until the 6 Geo. 4, c. 16, s. 3, fraudulent preference (except by deed) was not prohibited by any statute, but was void as a fraud on the Bankrupt Laws (*b*). If by deed, it was an act of bankruptcy (*c*).

Afterwards by the 6 Geo. 4, c. 16, s. 3, repealed and re-enacted by the 12 & 13 Vict. c. 106, s. 67, every fraudulent conveyance or transfer, whether of real property or chattels, (though not by deed) was erected into an act of bankruptcy. And a bill of exchange has been decided to be a chattel within this, as well as within other sections of the former Bankrupt Acts (*d*). The recent act 32 & 33 Vict. c. 71, ss. 1 and 6, erects any fraudulent conveyance of property of any kind into an act of bankruptcy.

To have been invalid as a fraudulent preference, a transfer or payment must have been spontaneous, and not at the instance or importunity of the creditor (*e*); it must have been with the intention of giving the creditor an unfair advantage, and not in the usual course of business (*f*); it must have been in contemplation of bankruptcy as a probable event (*g*).

But money was not, perhaps, a chattel within the former statutes, and therefore the payment of money, by way of fraudulent preference to a creditor, may have been only a void payment (*h*).

(*a*) 24 & 25 Vict. c. 134, s. 164.

(*b*) *Martin* v. *Pewtress*, 4 Burr. 2477.

(*c*) 1 Jac. 1, c. 15, s. 2; *Bevan* v. *Nunn*, 9 Bing. 107; 2 Moo. & Sc. 132.

(*d*) *Cumming* v. *Baily*, 6 Bing. 363; 4 Moore & P. 36, S. C. *Quære*, as to a country bank note. *Carr* v. *Burdiss*, 1 C., M. & R. 782; 5 Tyrw. 309, S. C. See post.

(*e*) *Mogg* v. *Baker*, 4 M. & W. 348; *Brown* v. *Kempton*, 19 L. J., C. P. 169; *Strachan* v. *Barton*, 25 L. J., Exch. 182.

(*f*) *Rust* v. *Cooper*, Cowp. 629.

(*g*) *Poland* v. *Glynn*, 4 Bing. 22, n.; 12 Moo. 109, n., S. C. In *Morgan* v. *Brundrett*, 5 B. & Ad. 289; 2 Nev. & M. 280, S. C., Mr. Justice Parke said that the cases on this subject had gone too far, and that actual bankruptcy and not mere insolvency must have been contemplated to make the preference fraudulent. And see *Atkinson* v. *Brindall*, 2 Bing. N. C. 225; 2 Scott, 369, S. C. But see *Aldred* v. *Constable*, 4 Q. B. 674.

(*h*) *Bevan* v. *Nunn*, 9 Bing. 107; 2 Moore & S. 132, S. C.; *Abell* v. *Daniell*, M. & M. 370; but see *Ex parte Simpson*, 1 De Gex, 9; also *Cannan* v. *Wood*, 2 M. & W. 467. If A. & B. are both creditors for the same debt, a payment to A., with the intention of serving B., is not a fraudulent preference of A. *Abbott* v. *Pomfret*, 1 Bing. N. C. 462; 1 Scott, 470; 1 Hodges, 24, S. C.; see *Reg.* v. *Radley*, 18 L. J., M. C. 134.

VOLUNTARY TRANSFER.

A voluntary transfer, without consideration, by a bankrupt, being at the time insolvent, of land, chattels, bills, bonds or notes or debts, was avoided by the 12 & 13 Vict. c. 106, s. 126, now repealed. A gift of money was not, it seems, within this section (*i*); but if the money were given with a fraudulent intent, the payment was void and the money recoverable.

But now by the existing act, 32 & 33 Vict. c. 71, s. 92, every transfer of property, or charge thereon, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by a person unable to pay his debts as they become due, out of his own monies, in favour of any creditor with a view of giving preference, is, if the party so dealing become a bankrupt within three months afterwards, void as against his trustee in bankruptcy.

DISCHARGE OF INSOLVENT DEBTORS.

The existing law relating to the discharge from their debts and engagements of insolvent debtors, whether traders or not, now depends on the enactments of the statute 32 & 33 Vict. c. 71.

But as that Act of Parliament does not affect rights which have arisen under the repealed acts, and as some decisions on the repealed acts may guide in the construction of existing enactments, it will still be useful to consider the former acts very briefly.

Acts recently in force.

The principal acts recently in force for the relief of insolvent debtors were the 1 & 2 Vict. c. 110, amended by the 2 & 3 Vict. c. 39 (*k*).

The last general act for this purpose, before the 1 & 2 Vict. c. 110, was the 7 Geo. 4, c. 57, most of the provisions in which act were re-enacted by the 1 & 2 Vict. c. 110, without alteration, so that the decisions on the earlier statutes are, for the most part, applicable to the latter one (*l*).

(*i*) *Kensington* v. *Chantler*, 2 M. & S. 36; *Ex parte Shortland*, 7 Ves. 88; *Ex parte Sharratt*, 2 Rose, 384; *Abell* v. *Daniell*, M. & M. 370.

(*k*) By the 10 & 11 Vict. c. 102, jurisdiction in matters of insolvency was transferred from the Court of Bankrupcy to the Court for the Relief of Insolvent Debtors; and the jurisdiction of both Courts was in cases of insolvency, more than twenty miles from London, vested in the County Court judges.

(*l*) The 5 & 6 Vict. c. 116, effected a most important alteration in the law, enacting that any person, not being a trader, and any trader owing less than 300*l*., might petition the Court of Bankruptcy, for protection from process, although he had not been to prison. The act was amended by the 7 & 8 Vict. c. 96, and the 12 & 13 Vict. c. 106, which enabled an insolvent *trader to petition* for protection, ss. 211 to 223. See as to

CHAPTER XXXVI.

Their general object in regard to bills and notes.

The object of the act 1 & 2 Vict. c. 110, was to discharge the insolvent's person from all his debts on bills or notes mentioned in his schedule, whether the persons to whom those debts may have become due be named in the schedule or not, provided there were no fraudulent or intentional misdescription or concealment. The act (*m*), therefore, expressly discharged the insolvent from the claims of all persons not known to him at the time of the adjudication, who might be indorsees or holders of any negotiable security set forth in the schedule.

Their effect on the liability of the insolvent to holders of a negotiable instrument.

Under the Lords' Act, 32 Geo. 2, c. 28, repealed by 1 & 2 Vict. c. 110, s. 119 (*n*), it was held that, where the indorsee of a bill sued the acceptor, and charged him in execution, and the acceptor obtained his discharge under the Lords' Act, and the indorsee then sued the drawer, who, after paying the bill, sued the acceptor and charged him in execution again, that the acceptor was not discharged, because the first execution was not a satisfaction as between the drawer and acceptor (*o*). This decision, however, proceeded on the limited scope of the Lords' Act, which only proposed to discharge a prisoner from gaol as to a particular pressing creditor, and not, like the acts for the relief of the insolvent debtor, to discharge him from all his debts and liabilities. Therefore, a discharge by the Court for the Relief of Insolvent Debtors had a much more extensive effect. An insolvent acceptor inserted in his schedule the name of the indorsee, but not of the drawer of the bill, and was discharged; afterwards the drawer took up the bill and sued the insolvent, who pleaded his discharge. It was held that the defendant was discharged (*p*). It is conceived that a debtor discharged by the Court for the Relief of Insolvent Debtors, from a bill which is at maturity, is discharged, not only as against the holder at the time of his schedule, but as against all subsequent transferees, and all parties who may take up the bill (*p*).

the 7 & 8 Vict. c. 96, the case of *Phillips* v. *Pickford*, 19 L. J. 171; and as to 12 & 13 Vict. c. 106, ss. 211 and 216, *Levy* v. *Horne*, 19 L. J., Exch. 260; 5 Exch. 257, S. C.; *Alcard* v. *Wesson*, 7 Exch. 753; 8 Exch. 260, in error.

(*m*) 1 & 2 Vict. c. 110, s. 75. See *Litton* v. *Dalton*, T. T. 1864, C. P.

(*n*) The repeal of a repealing statute does not now revive the statute first repealed, 13 & 14 Vict. c. 21, s. 6.

(*o*) *M'Donald* v. *Bovington*, 4 T. R. 825; and see the decisions on 49 Geo. 3, c. 115; *Lucas* v. *Winton*, 2 Camp. 443; *Simpson* v. *Pogson*, 3 Dow. & R. 567.

(*p*) *Boydell* v. *Champneys*, 2 M. & W. 438.

Where there were two joint makers of a promissory note, the one a principal and the other a surety, and the principal had been discharged by the Court for the Relief of Insolvent Debtors, and the surety was obliged to pay the note, the surety might sue the principal notwithstanding his discharge (*q*).

Effect of discharge of one of two makers of a note.

The debt must have been properly described in the schedule (*r*).

If the bill were substantially described in the schedule, an unintentional mistake or defect in the description, either of the bill or of the parties to it, would not prejudice the insolvent (*s*).

Description of the bill or note in the schedule.

But if the insolvent had wilfully omitted the name of an indorsee or holder, known by the insolvent to be so, he was not discharged (*t*).

If the debt only be mentioned in the schedule, the debtor was not discharged from the bill. The bill or note should have been mentioned, and the name of the holder also, or else it should have been stated that the holder was not known to the insolvent (*u*). But if the name were in fact not known, it was enough to mention the bill (*x*).

And if by mistake the debt had been stated to be 3*l.* when it should be 7*l.*, as the consequence was to deprive the creditor of the benefit of the notice to creditors for 5*l.* and upwards, the debtor was not discharged (*y*).

A notice to the creditor of the filing of the insolvent's

Notice to the creditor.

(*q*) *Powell* v. *Eason*, 8 Bing. 23; 1 M. & Sco. 68, S. C.

(*r*) 1 & 2 Vict. c. 110, ss. 69 and 93; *Franklin* v. *Beesley*, 28 L. J., Q. B. 161.

(*s*) *Forman* v. *Drew*, 4 B. & C. 15; 6 D. & R. 75, S. C.; *Wood* v. *Jowett*, 4 B. & C. 20, n.; *Reeves* v. *Lambert*, ibid. 214; *Nias* v. *Nicholson*, R. & M. 322; 2 C. & P. 120, S. C.; *Levy* v. *Dolbell*, M. & M. 202; *Boydell* v. *Champneys*, 2 M. & W. 433; *Eastwood* v. *Brown*, R. & M. 312; *Cox* v. *Read*, ibid. 199; 1 C. & P. 602, S. C.; *Sharp* v. *Gye*, 4 C. & P. 311; *Symons* v. *May*, 6 Exch. 707; *Romellio* v. *Halaghan*, 30 L. J., Exch. 231; 1 E., B. & S. 279. But see *Tinney* v. *Cecil*, 26 L. J., C. P. 53; *Reeves* v. *Mackay*, C. P., Mich. 1861.

(*t*) *Pugh* v. *Hookham*, 5 C. & P. 376; *Lewis* v. *Mason*, 4 C. & P. 322.

(*u*) *Beck* v. *Beverley*, 11 M. & W. 845; *Tyers* v. *Stunt*, 7 Scott, 349; *Leonard* v. *Baker*, 15 M. & W. 202; *Chambers* v. *Smith*, 11 C. B. 358; *Kemp* v. *Murry*, 11 Exch. 47; *Symonds* v. *May*, 6 Exch. 707; *Romellio* v. *Halaghan*, 1 E., B. & S. 279.

(*x*) *Booth* v. *Coldman*, 28 L. J., Q. B. 137; 1 E. & E. 414, S. C.

(*y*) *Hoyles* v. *Blore*, 14 M. & W. 387. The expression "debts *growing due*," only applies to debts already ascertained, though payable at a future day; *Skelton* v. *Watt*, 2 Exch 231.

CHAPTER XXXVI.

petition and schedule, was not a condition precedent to his discharge, for the notice was the act of the Court (*z*).

Effect of the insolvent's discharge on the liability of other persons to the holder.

A discharge by the Court for the Relief of Insolvent Debtors, though it discharged the person of the insolvent from liability, was no discharge of other parties to the bill, except to the amount of the sum received by the holder from the insolvent's estate.

Effect of a bill or note given for the debt from which the insolvent has been discharged.

The act 1 & 2 Vict. c. 110, s. 91, avoided any new contract or security for payment of a debt from which the insolvent had been discharged under the act; therefore, a bill or note for a debt from which the insolvent had obtained his discharge, was as to that debt void, and void notwithstanding that the bill or note had been made on some additional and good consideration (*a*).

But it had been held that an innocent indorsee, for value without notice, before maturity of the instrument, could, notwithstanding, recover on such a note (*b*).

And a bill accepted partly for a debt from which the acceptor had been discharged by the Insolvent Debtors' Act, and partly for a new debt, was good as to the new debt (*c*).

Of a bill or note given to prevent opposition.

A bill or note given in consideration of not opposing an insolvent's discharge, or of withdrawing opposition to it, was void, except in the hands of an innocent indorsee for value (*d*).

Effect of vesting order.

The effect of the vesting order was to vest in the provisional assignee all bills and notes belonging to the insolvent, and the insolvent could not indorse them, but if the petition

(*z*) *Reid* v. *Croft*, 5 Bing. N. C. 68; 6 Scott, 770; 7 Dowl. 122, S. C.

(*a*) *Evans* v. *Williams*, 1 C. & M. 30; 3 Tyr. 226, S. C.; *Ashley* v. *Killick*, 5 M. & W. 509; and see *Kernot* v. *Pittis*, 2 E. & B. 421.

(*b*) *Northam* v. *Latouche*, 4 C. & P. 140; *Lucas* v. *Winton*, 2 Camp. 443; *Simpson* v. *Pogson*, 3 Dow. & R. 567. As to a warrant of attorney, see *Philpot* v. *Aslett*, 1 C., M. & R. 85; *Best* v. *Barker*, 8 Price, 533; 3 Doug. 188, S. C.

(*c*) *Sheerman* v. *Thompson*, 11 Ad. & E. 1027; 3 Per. & Dav. 656, S. C.; *Denne* v. *Knott*, 7 M. & W. 143, where one of several defendants has been discharged under the act; and see *Raynes* v. *Jones*, 9 M. & W. 104.

(*d*) *Murray* v. *Reeves*, 8 B. & C. 421; 2 M. & Ry. 423, S. C.; *Rogers* v. *Kingston*, 2 Bing. 441; 10 Moore, 97, S. C.; *Horn* v. *Ion*, 4 B. & Ad. 78; 1 N. & M. 627, S. C.; *Hall* v. *Dyson*, 21 L. J., Q. B. 224; 17 Q. B. 785, S. C.; *Hills* v. *Mitson*, 8 Exch. 751.

were dismissed, or if the detaining creditor assented to the discharge of the insolvent before adjudication, it was held by the Court of Queen's Bench, that the property in such bills and notes in the hands of the insolvent revested at once in him, and his ability to indorse returned (*e*). But the Court of Exchequer Chamber afterwards held that the property did not so revest (*f*).

(*e*) *Grange* v. *Trukett*, 21 L. J., Q. B. 26; 2 E. & B. 395.

(*f*) *Kernot* v. *Pittis*, 2 Ad. & E. 406 and 421.

APPENDIX.

SECTION I.

NOTARY'S FEES OF OFFICE.

As settled July 1st, 1799.

At a meeting of several notaries of the City of London, held at the George and Vulture Tavern, in London aforesaid, on the 1st of July, A.D. 1797, the following resolutions were unanimously agreed to, and since approved and confirmed by the Governor and Company of the Bank of England:—

First.—That, from and after the fifth day of the present month of July, the noting of all bills drawn upon or addressed at the house of any person or persons residing within the ancient walls of the said city of London shall be charged one shilling and sixpence; and without the said walls, and not exceeding the limits hereunder specified, the sum of two shillings and sixpence.

Second.—For all bills drawn upon, or addressed at, the house of any person or persons residing beyond Old or New Bond Street, Wimpole Street, New Cavendish Street, Upper Marylebone Street, Howland Street, Lower Gower Street, lower end of Gray's Inn Lane (and not off the pavement), Clerkenwell Church, Old Street, Shoreditch Church, Brick Lane, St. George's in the East, Execution Dock, Wapping, Dockhead, upper end of Bermondsey Street (as far as the church), end of Blackman Street, end of Great Surrey Street, Blackfriars Road (as far as the Circus), Cuper's Bridge, Bridge Street, Westminster, Arlington Street, Piccadilly, and the like distances, three shillings and sixpence; and, off the pavement, one shilling and sixpence per mile additional.

Third.—For protesting a bill drawn upon, or addressed at, the house of any person or persons residing within the ancient walls of the said city (including the stamp duty of four shillings, and exclusive of the charge of noting), the sum of six shillings and sixpence, and without the ancient walls of the said city, including the like stamp duty, and exclusive of the said charge of noting, the sum of eight shillings, agreeably to the second article.

Fourth.—That all acts of honour, within the ancient walls of the city of London, shall be charged the said sum of one shilling and sixpence upon each bill; and for all acts of honour without the ancient walls of the said city, to be regulated agreeably to the

charge of noting bills out of the city, and the like charge for any additional demand that may be made upon the said bill, or when the same is mentioned and inserted in the answer in the protest.

Fifth.—*For every post, demand, and act thereof*, within the ancient walls of the said city, the sum of two shillings and sixpence; and without the walls of the said city, the sum of three shillings and sixpence (provided the same be only registered in the notary's book); and so in proportion, according to the distance, to be regulated agreeably to the charge of noting bills.

Sixth.—For every copy of bill paid in part, and a receipt at foot of such copy, shall be charged two shillings; and so in proportion for every additional bill so copied (exclusive of the receipt stamp).

Seventh.—For every duplicate protest of one bill (including four shillings for the duty) shall be charged the sum of seven shillings and sixpence, and so in like proportion of three shillings and sixpence (exclusive of the duty) for every additional bill.

Eighth.—For every folio of ninety words, translated from the French, Dutch, or Flemish, into English, or from the English into French, Dutch, or Flemish, two shillings for each such folio; and from Italian, Spanish, Portuguese, German, Danish, and Swedish, one shilling and ninepence per folio of ninety words; and from Latin, two shillings and sixpence per folio; and for attesting the same to be a true translation, if necessary, seven shillings and sixpence, exclusive of fees and stamps.

Ninth.—That all attestations to letters of attorney, affidavits, &c., at the request of any gentleman in the law, shall be charged seven shillings and sixpence, exclusive of fees, stamps, and attendance.

Tenth.—For every city seal shall be charged one guinea, for one deponent, exclusive of attendance, and exemplification; and if more than one deponent, ten shillings and sixpence for each additional affidavit.

Eleventh.—For all notarial copies shall be charged sixpence per folio of seventy-two words, exclusive of attestation, stamps, &c.

Section II.

STATUTES.

[9 & 10 Will. 3, c. 17.]

An Act for the better Payment of Inland Bills of Exchange.

9 & 10 Will. 3, c. 17.

"Whereas great damages and other inconveniences do frequently happen in the course of trade and commerce, by reason of delays of payment, and other neglects on inland bills of exchange in this kingdom: Be it therefore enacted by the king's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and the commons, in this present Parliament assembled, and by the authority of the same, That from and

9 & 10 Will. 3, c. 17.

after the four and twentieth day of June next, which shall be in the year one thousand six hundred and ninety-eight, all and every bill or bills of exchange drawn in, or dated at and from, any trading city or town, or any other place in the kingdom of England, dominion of Wales, or town of Berwick upon Tweed, of the sum of five pounds sterling or upwards, upon any person or persons of or in London, or any other trading city, town, or any other place (in which said bill or bills of exchange shall be acknowledged and expressed the said value to be received), and is and shall be drawn payable at a certain number of days, weeks, or months after date thereof, that from and after presentation and acceptance of the said bill or bills of exchange (which acceptance shall be by the underwriting the same under the party's hand so accepting), and after the expiration of three days after the said bill or bills shall become due, the party to whom the said bill or bills are made payable, his servant, agent, or assigns, may and shall cause the said bill or bills to be protested by a notary public, and in default of such notary public by any other substantial person of the city, town, or place, in the presence of two or more credible witnesses, refusal or neglect being first made of due payment of the same: which protest shall be made and written under a fair written copy of the said bill of exchange, in the words or form following:

Bills of exchange drawn in England, &c. of 5*l.* or upwards, payable at a certain number of days, &c. after acceptance, and three days after it is due, may be protested.

Further provisions relating hereto, 3 & 4 Anne, c. 9, s. 4, 1 Salk. 131; Mod. Cases in the Law, 80, 373; 6 Mod. 80.

Know all men, that I, *A. B.*, on the day of at the usual place of abode of the said have demanded payment of the bill, of the which the above is the copy, which the said did not pay, wherefore I the said do hereby protest the said bill. Dated this day of

The form of the protest.

II. Which protest so made as aforesaid shall, within fourteen days after making thereof, be sent, or otherwise due notice shall be given thereof, to the party from whom the said bill or bills were received, who is, upon producing such protest, to repay the said bill or bills, together with all interest and charges from the day such bill or bills were protested; for which protest shall be paid a sum not exceeding the sum of sixpence; and in default or neglect of such protest made and sent, or due notice given within the days before limited, the person so failing or neglecting thereof is and shall be liable to all costs, damages, and interest, which do and shall accrue thereby.

Protest or notice thereof to be given in fourteen days after made.

And 6*d.* for the protest.

In default of protest made, &c., person failing liable to costs.

III. Provided nevertheless, that in case any such inland bill or bills of exchange shall happen to be lost or miscarried within the time before limited for payment of the same, then the drawer of the said bill or bills is and shall be obliged to give another bill or bills of the same tenor with those first given, the person or persons to whom they are and shall be so delivered, giving security, if demanded, to the said drawer, to indemnify him against all persons whatsoever, in case the said bill or bills of exchange, so alleged to be lost or miscarried, shall be found again.

Bills lost or miscarried, drawer to give another.

[3 & 4 Anne, c. 9, s. 1.]

An Act for giving like Remedy upon Promissory Notes as is now used upon Bills of Exchange, and for the better Payment of Inland Bills of Exchange.

3 & 4 Anne, c. 9, s. 1.

"Whereas it hath been held, that notes in writing, signed by the party who makes the same, whereby such party promises to pay unto any other person, or his order, any sum of money therein mentioned, are not assignable or indorsable over, within the custom of merchants, to any other person, and that such person to whom the sum of money mentioned in such note is payable cannot maintain an action, by the custom of merchants, against the person who first made and signed the same; and that any person to whom such note should be assigned, signed, indorsed or made payable, could not, within the said custom of merchants, maintain any action upon such note, against the person who first drew and signed the same:" therefore, to the intent to encourage trade and commerce, which will be much advanced if such notes shall have the same effect as inland bills of exchange, and shall be negotiated in like manner, be it enacted by the queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, That all notes in writing that, after the first day of May, in the year of our Lord one thousand seven hundred and five, shall be made and signed by any person or persons, body politic or corporate, or by the servant or agent of any corporation, banker, goldsmith, merchant or trader, who is usually intrusted by him, her or them, to sign such promissory notes for him, her or them, whereby such person or persons, body politic and corporate, his, her or their servant or agent, as aforesaid, doth or shall promise to pay to any other person or persons, body politic and corporate, his, her or their order, or unto bearer, any sum of money mentioned in such note, shall be taken and construed to be, by virtue thereof, due and payable to any such person or persons, body politic and corporate, to whom the same is made payable, and also every such note payable to any person or persons, body politic and corporate, his, her or their order, shall be assignable or indorsable over in the same manner as inland bills of exchange are or may be, according to the custom of merchants; and that the person or persons, body politic and corporate, to whom such sum of money is or shall be, by such note, made payable, shall and may maintain an action for the same, in such manner as he, she or they might do upon an inland bill of exchange made or drawn according to the custom of merchants against the person or persons, body politic and corporate, who, or whose servant or agent, as aforesaid, signed the same; and that any person or persons, body politic and corporate, to whom such note that is payable to any person or persons, body politic and corporate, his, her or their order, is indorsed or assigned, or the money therein mentioned ordered to be paid, by indorsement thereon, shall and may maintain his, her or their action for such sum of money, either against the person or persons, body politic and corporate, who, or

See 1 Burr. 227, 325. This act (being for the benefit of commerce) is liberally construed, 3 Wils. 1.

Promissory notes may be assigned or indorsed, and action maintained thereon as on inland bills of exchange.

whose servant or agent, as aforesaid, signed such note, or against any of the persons that indorse the same, in like manner as in cases of inland bills of exchange. And, in every such action, the plaintiff or plaintiffs shall recover his, her or their damages and costs of suit; and, if such plaintiff or plaintiffs shall be nonsuited, or a verdict be given against him, her or them, the defendant or the defendants shall recover his, her or their costs against the plaintiff or plaintiffs; and every such plaintiff or plaintiffs, defendant or defendants, respectively recovering may sue out execution for such damages and costs, by *capias, fieri facias* or *elegit*.

3 & 4 Anne, c. 9, s. 1.

Plaintiff or defendant may recover costs.

[17 Geo. 3, c. 30, ss. 1, 2, 4, made perpetual by 27 Geo. 3, c. 16.]

An Act for further restraining the Negotiation of Promissory Notes and Inland Bills of Exchange, under a limited Sum, within that Part of Great Britain called England.

17 Geo. 3, c. 30.

15 Geo. 3 recited.

"Whereas, by a certain act of parliament, passed in the fifteenth year of the reign of his present majesty, (intituled 'An Act to restrain the Negotiation of Promissory Notes and Inland Bills of Exchange, under a limited Sum, within that part of Great Britain called England,') all negotiable promissory or other notes, bills of exchange or drafts, or undertakings in writing, for any sum of money less than the sum of twenty shillings in the whole, and issued after the twenty-fourth day of June, one thousand seven hundred and seventy-five, were made void, and the publishing or uttering and negotiating of any such notes, bills, drafts or undertakings, for a less sum than twenty shillings, or on which less than that sum should be due, was by the said act restrained, under certain penalties or forfeitures therein mentioned; and all such notes, bills of exchange, drafts or undertakings in writing, as had issued before the said twenty-fourth day of June, were made payable upon demand, and were directed to be recovered in such manner as is therein also mentioned; and whereas the said act hath been attended with very salutary effects, and, in case the provisions therein contained were extended to a further sum (but yet without prejudice to the convenience arising to the public from the negotiation of promissory notes and inland bills of exchange, for the remittance of money in discharge of any balance of account or other debt), the good purposes of the said act would be further advanced:" Be it therefore enacted by the king's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that all promissory or other notes, bills of exchange or drafts, or undertakings in writing, being negotiable or transferable, for the payment of twenty shillings, or any sum of money above that sum, and less than five pounds, or on which twenty shillings or above that sum, and less than five pounds, shall remain undischarged, and which shall be issued within that part of Great Britain called England, at any time after the first day of

All negotiable promissory notes, &c. for 20*s.* and less than 5*l.* shall specify the name, &c. of the persons to whom payable.

17 Geo. 3, c. 30.

January, one thousand seven hundred and seventy-eight, shall specify the names and places of abode of the persons respectively to whom, or to whose order, the same shall be made payable; and shall bear date before or at the time of drawing or issuing thereof, and not on any day subsequent thereto; and shall be made payable within the space of twenty-one days next after the day of the date thereof: and shall not be transferable or negotiable after the time thereby limited for payment thereof; and that every indorsement to be made thereon shall be made before the expiration of that time, and to bear date at or not before the time of making thereof; and shall specify the name and place of abode of the person or persons to whom, or to whose order, the money contained in every such note, bill, draft or undertaking is to be paid; and that the signing of every such note, bill, draft or undertaking, and also of every such indorsement, shall be attested by one subscribing witness at the least; and which said notes, bills of exchange or drafts, or undertakings in writing, may be made or drawn in words to the purport or effect as set out in the schedule hereunto annexed, Nos. I. and II.; and that all promissory or other notes, bills of exchange or drafts, or undertakings in writing, being negotiable or transferable, for the payment of twenty shillings, or any sum of money above that sum, and less than five pounds, or in which twenty shillings, or above that sum, and less than five pounds, shall remain undischarged, and which shall be issued within that part of Great Britain called England, at any time after the said first day of January, one thousand seven hundred and seventy-eight, in any other manner than as aforesaid, and also every indorsement on any such note, bill, draft or undertaking to be negotiated under this act, other than as aforesaid, shall and the same are hereby declared to be absolutely void; any law, statute, usage or custom to the contrary thereof in anywise notwithstanding.

Signing of every such note and indorsement to be attested by one witness.

Penalty.

II. And be it further enacted, by the authority aforesaid, that the publishing, uttering or negotiating within that part of Great Britain called England, of any promissory or other note, bill of exchange, draft or undertaking in writing, being negotiable or transferable, for twenty shillings or above that sum, and less than five pounds, or on which twenty shillings or above that sum, and less than five pounds, shall remain undischarged, and issued or made in any other manner than notes, bills, drafts or undertakings, hereby permitted to be published or negotiated as aforesaid; and also the negotiating of any such last-mentioned notes, bills, drafts or undertakings after the time appointed for payment thereof, or before that time in any other manner than as aforesaid, by any act, contrivance or means whatsoever, from and after the said first day of January, one thousand seven hundred and seventy-eight, shall be, and the same is hereby declared to be, prohibited or restrained, under the like penalties or forfeitures, and to be recovered and applied in like manner, as by the said act is directed with respect to the uttering or publishing or negotiating of notes, bills of exchange, drafts or undertakings in writing, for any sum of money

not less than the sum of twenty shillings, or on which less than that sum should be due. 17 Geo. 3, c. 30.

IV. And be it further enacted, by the authority aforesaid, that the said former, and also this present act, shall continue in force, not only for the residue of the term of five years in the said former act mentioned, and from thence to the end of the then next session of parliament, but also for the further term of five years, and from thence to the end of the then next session of parliament. Continuance of this and former act.

SCHEDULE, No. I.

[*place*] [*day*] [*month*] [*year*].
Twenty-one days after date I promise to pay to A. B., of [*place*] , or his order, the sum of for value received by .
Witness, E. F. C. D.

And the Indorsement, toties quoties.

[*day*] [*month*] [*year*].
Pay the contents to G. H., of [*place*], or his order.
Witness, J. K. A. B.

No. II.

[*place*] [*day*] [*month*] [*year*].
Twenty-one days after date pay to A. B., of [*place*] , or his order, the sum of , value received, as advised by .
To E. F., of [*place*] .
Witness, G. H. C. D.

And the Indorsement, toties quoties.

[*day*] [*month*] [*year*].
Pay the contents to J. K., of [*place*], or his order.
Witness, L. M. A. B.

[48 Geo. 3, c. 88, ss. 1, 2, 3, 4.]

An Act to restrain the Negotiation of Promissory Notes and Inland Bills of Exchange under a Limited Sum in England.

"Whereas various notes, bills of exchange and drafts for money for very small sums have for some time past been circulated or negotiated in lieu of cash, within that part of Great Britain called England, to the great prejudice of trade and public credit, and many of such bills and drafts being payable under certain terms and restrictions, which the poorer sort of manufacturers, artificers, labourers, and others, cannot comply with otherwise than by being subject to great extortion and abuse: and whereas an act passed in the fifteenth year of the reign of his present Majesty, intituled 'An Act to restrain the Negotiation of Promissory Notes and Inland Bills of Exchange under a Limited Sum, within that part of Great 48 Geo. 3, c. 88. 15 Geo. 3, c. 51, repealed.

48 Geo. 3, c. 88.

Britain called England,' for preventing the circulating such notes and drafts; and whereas doubts have arisen as to the power of justices of the peace to hear and determine offences under the said act, and it is therefore expedient that more effectual provisions should be made for enforcing the provisions of the said act;" be it therefore enacted, by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that from and after the passing of this act the said recited act shall be, and the same is, hereby repealed.

Promissory notes for less than 20*s.* declared void.

II. And be it further enacted, that all promissory or other notes, bills of exchange or drafts, or undertakings in writing, being negotiable or transferable, for the payment of any sum or sums of money, or any orders, notes or undertakings in writing, being negotiable or transferable, for the delivery of any goods, specifying their value in money, less than the sum of twenty shillings in the whole, heretofore made or issued, or which shall hereafter be made or issued, shall, from and after the first day of October, one thousand eight hundred and eight, be, and the same are hereby declared to be, absolutely void and of no effect; any law, statute, usage or custom to the contrary thereof in anywise notwithstanding.

Penalty on persons uttering such notes, 20*s.* to 5*l.*

III. And be it further enacted, that if any person or persons shall, after the first day of July, one thousand eight hundred and eight, by any art, device or means whatsoever, publish or utter any such notes, bills, drafts or engagements as aforesaid, for a less sum than twenty shillings, or on which less than the sum of twenty shillings shall be due, and which shall be in anywise negotiable or transferable, or shall negotiate or transfer the same, every such person shall forfeit and pay, for every such offence, any sum not exceeding twenty pounds, nor less than five pounds, at the discretion of the justice of the peace who shall hear and determine such offence.

Justices may determine on such offences within twenty days.

IV. And be it further enacted, that it shall be lawful for any justice or justices of the peace, acting for the county, riding, city or place within which any offence against this act shall be committed, to hear and determine the same in a summary way, at any time within twenty days after such offence shall have been committed; and such justice or justices, upon any information exhibited, or complaint made upon oath in that behalf, shall summon the party accused, and also the witnesses on either side, and shall examine into the matter of fact, and upon due proof made thereof, either by the voluntary confession of the party, or by the oath of one or more credible witness or witnesses, or otherwise (which oath such justice or justices is or are hereby authorized to administer), shall convict the offender and adjudge the penalty for such offence.

[55 Geo. 3, c. 184, ss. 10 to 29.]

An Act for repealing the Stamp Duties on Deeds, Law Proceedings, and other written or printed Instruments, and the Duties on Fire Insurances, and on Legacies and Successions to Personal Estate upon Intestacies, now payable in Great Britain, and for granting other Duties in lieu thereof.

[GENERAL STAMP ACT.]

X. And be it further enacted, that, from and after the passing of this act, all instruments for or upon which any stamp or stamps shall have been used of an improper denomination or rate of duty, but of equal or greater value in the whole with or than the stamp or stamps which ought regularly to have been used thereon, shall, nevertheless, be deemed valid and effectual in the law, except in cases where the stamp or stamps used on such instruments shall have been specially appropriated to any other instrument, by having its name on the face thereof.

Instruments having wrong stamps, but of sufficient value, valid.

Exceptions.

XI. And be it further enacted, that if any person or persons shall make, sign or issue, or cause to be made, signed or issued, or shall accept or pay, or cause or permit to be accepted or paid, any bill of exchange, draft or order, or promissory note, for the payment of money, liable to any of the duties imposed by this act, without the same being duly stamped for denoting the duty hereby charged thereon, he, she or they shall, for every such bill, draft, order or note, forfeit the sum of fifty pounds.

Making, &c., bills of exchange, &c., not duly stamped.

Penalty.

XII. And be it further enacted, that if any person or persons shall make and issue, or cause to be made and issued, any bill of exchange, draft or order, or promissory note, for the payment of money at any time after date or sight, which shall bear date subsequent to the day on which it shall be issued, so that it shall not in fact become payable in two months, if made payable after date, or in sixty days, if made payable after sight, next after the day on which it shall be issued, unless the same shall be stamped for denoting the duty hereby imposed on a bill of exchange, and promissory note, for the payment of money at any time exceeding two months after date, or sixty days after sight, he, she or they shall, for every such bill, draft, order or note, forfeit the sum of one hundred pounds.

Post-dating bills of exchange, &c.

Penalty.

XIII. And, for the more effectually preventing of frauds and evasions of the duties hereby granted on bills of exchange, drafts or orders for the payment of money, under colour of the exemption in favour of drafts or orders upon bankers, or persons acting as bankers, contained in the schedule hereunto annexed, be it further enacted, that if any person or persons shall, after the thirty-first day of August, one thousand eight hundred and fifteen, make and issue, or cause to be made and issued, any bill, draft or order for the payment of money to the bearer on demand, upon any banker or bankers, or any person or persons acting as a banker or bankers,

Issuing unstamped drafts on bankers, without specifying place where issued, or if post-dated.

55 Geo. 3, c. 184.

which shall be dated on any day subsequent to the day on which it shall be issued, or which shall not truly specify and express the place where it shall be issued, or which shall not, in every respect, fall within the said exemption, unless the same shall be duly stamped as a bill of exchange according to this act, the person or persons so offending shall, for every such bill, draft or order forfeit the sum of one hundred pounds; and if any person or persons shall knowingly receive or take any such bill, draft or order in payment of, or as a security for, the sum therein mentioned, he, she or they shall, for every such bill, draft or order, forfeit the sum of twenty pounds; and if any banker or bankers, or any person or persons acting as a banker, upon whom any such bill, draft or order shall be drawn, shall pay, or cause or permit to be paid, the sum of money therein expressed, or any part thereof, knowing the same to be post-dated, or knowing that the place where it was issued is not truly specified and set forth therein, or knowing that the same does not, in any other respect, fall within the said exemption, then the banker or bankers, or person or persons so offending shall, for every such bill, draft or order, forfeit the sum of one hundred pounds, and, moreover, shall not be allowed the money so paid, or any part thereof, in account against the person or persons by or for whom such bill, draft or order shall be drawn, or his, her or their executors or administrators, or his, her or their assignees or creditors, in case of bankruptcy or insolvency, or any other person or persons claiming under him, her or them.

Penalty.

Receiving, &c. such drafts.

Penalty.

Bankers paying them.

Penalty.

Promissory notes to bearer on demand, not exceeding 100*l.*, reissued by original makers without further duty.

XIV. And be it further enacted, that from and after the thirty-first day of August, one thousand eight hundred and fifteen, it shall be lawful for any banker or bankers, or other person or persons, who shall have made and issued any promissory notes for the payment to the bearer on demand of any sum of money not exceeding one hundred pounds each, duly stamped according to the directions of this act, to reissue the same from time to time, after payment thereof, as often as he, she or they shall think fit, without being liable to pay any further duty in respect thereof; and that all promissory notes, so to be re-issued as aforesaid, shall be good and valid, and as available in the law, to all intents and purposes, as they were upon the first issuing thereof.

Such notes not liable to further duty, though reissued by certain persons not strictly the original makers.

XV. And be it further enacted, that no promissory note for the payment to the bearer on demand of any sum of money not exceeding one hundred pounds, which shall have been made and issued by any bankers or other persons in partnership, and for which the proper stamp duty shall have been once paid, according to the provisions of this act, shall be deemed liable to the payment of any further duty, although the same shall be re-issued by and as the note of some only of the persons who originally made and issued the same, or by and as the note of any one or more of the persons who originally made and issued the same and any other person or persons in partnership with him or them jointly; nor although such note, if made payable at any other than the place

where drawn, shall be re-issued with any alteration therein only of the house or place at which the same shall have been at first made payable. 55 Geo. 3, c. 184.

XVI. And be it further enacted, that all promissory notes for the payment to the bearer on demand of any sum of money, which shall have been actually and *bonâ fide* issued, and in circulation, before or upon the said thirty-first day of August, one thousand eight hundred and fifteen, duly stamped, according to the aforesaid act of the forty-eighth year of his Majesty's reign, and which shall then be re-issuable, within the intent and meaning of that act, or of an act passed in the fifty-third year of his Majesty's reign, for altering, explaining and amending the said former act, with regard to the duties on re-issuable promissory notes, shall continue to be re-issuable until the expiration of three years from the date thereof respectively, but not afterwards, without payment of any further duty for the same; and if any banker or bankers, or other person or persons, shall, at any time after the said thirty-first day of August, issue, or cause to be issued, for the first time, any promissory note for the payment of money to the bearer on demand, bearing date before or upon that day, he, she or they shall, for every such promissory note, forfeit the sum of fifty pounds. Notes re-issuable under 48 Geo. 3, c. 149, or 53 Geo. 3, c. 108, to continue re-issuable till end of three years from date. In what case bankers issuing promissory notes. Penalty.

XVII. Provided always, and in regard that certain bankers in Scotland have issued promissory notes for the payment to the bearer on demand, of a sum not exceeding two pounds and two shillings each, with the dates thereof printed therein, and many such notes have been but recently issued for the first time, although they may appear by the date to be of more than three years' standing, be it further enacted, that all such promissory notes as last mentioned, which shall have been actually and *bonâ fide* issued and in circulation before or upon the said thirty-first day of August, one thousand eight hundred and fifteen, duly stamped, according to the said act of the forty-eighth year of his Majesty's reign, and which shall bear a printed date prior to the thirty-first day of August, one thousand eight hundred and thirteen, shall continue to be re-issuable until the thirty-first day of August, one thousand eight hundred and sixteen, but not afterwards, without payment of any further duty for the same; and if any banker or bankers, or other person or persons, shall, at any time after the said thirty-first day of August, one thousand eight hundred and fifteen, issue, or cause to be issued, for the first time, any such promissory note, bearing a printed date prior to the said thirty-first day of August, one thousand eight hundred and thirteen, he or they shall, for every promissory note so issued, forfeit the sum of fifty pounds. Notes, with printed dates prior to Aug. 31, 1813, re-issuable till Aug. 31, 1816. 48 Geo. 3, c. 149. Issuing notes with printed dates for the first time. Penalty.

XVIII. And be it further enacted, that from and after the thirty-first day of August, one thousand eight hundred and fifteen, it shall not be lawful for any banker or bankers, or other person or persons, to issue any promissory note for the payment of money Issuing notes in future with printed dates.

55 Geo. 3, c. 184.

to the bearer on demand, liable to any of the duties imposed by this act, with the date printed therein; and if any banker or bankers, or other person or persons, shall issue, or cause to be issued, any such promissory note, with the date printed therein, he or they shall, for every promissory note so issued, forfeit the sum of fifty pounds.

Penalty.

Notes re-issuable for limited period, cancelled on payment afterwards; and notes not re-issuable, cancelled immediately on payment.

XIX. And be it further enacted, that all promissory notes hereby allowed to continue re-issuable for a limited period, but not afterwards, shall upon the payment thereof, at any time after the expiration of such period, and all promissory notes, bills of exchange, drafts or orders for money, not hereby allowed to be re-issued, shall, upon any payment thereof, be deemed and taken respectively to be thereupon wholly discharged, vacated and satisfied, and shall be no longer negotiable or available in any manner whatsoever, but shall be forthwith cancelled by the person or persons paying the same; and if any person or persons shall re-issue, or cause or permit to be re-issued, any promissory note hereby allowed to be re-issued for a limited period, as aforesaid, at any time after the expiration of the term or period allowed for that purpose; or if any person or persons shall re-issue, or cause or permit to be re-issued, any promissory note, bill of exchange, draft or order for money, not hereby allowed to be re-issued at any time after the payment thereof; or if any person or persons paying or causing to be paid any such note, bill, draft or order as aforesaid, shall refuse or neglect to cancel the same, according to the directions of this act, then, and in either of those cases, the person or persons so offending shall, for every such note, bill, draft or order as aforesaid, forfeit the sum of fifty pounds; and in case of any such note, bill, draft or order being re-issued contrary to the intent and meaning of this act, the person or persons re-issuing the same, or causing or permitting the same to be re-issued, shall also be answerable and accountable to his Majesty, his heirs and successors, for a further duty in respect of every such note, bill, draft or order, of such and the same amount as would have been chargeable thereon in case the same had been then issued for the first time, and so from time to time as often as the same shall be so re-issued, which further duty shall and may be sued for and recovered accordingly as a debt to his Majesty, his heirs and successors; and if any person or persons shall receive or take any such note, bill, draft or order in payment of, or as a security for, the sum therein expressed, knowing the same to be re-issued contrary to the intent and meaning of this act, he, she or they shall, for every such note, bill or draft or order, forfeit the sum of twenty pounds.

Re-issuing notes, &c.

Not cancelling notes, &c.

Penalty.

Re-issuing contrary to act.

Further duty.

Taking notes, &c. re-issued contrary to act.

Penalty.

Notes and bills of Bank of England exempt from stamp duty.

XX. And be it further enacted, that all promissory notes and bank post bills which shall be issued by the governor and company of the Bank of England, from and after the said thirty-first day of August, one thousand eight hundred and fifteen, shall be freed and exempted from all the duties hereby granted; and that it shall be lawful for the said governor and company to re-issue

any of their notes, after payment thereof, as often as they shall think fit.

48 Geo. 3, c. 149, s. 15, made to cease.

XXI. And be it further enacted, that the composition payable by the said governor and company of the Bank of England for the stamp duties on their promissory notes and bank post bills, under the aforesaid act of the forty-eighth year of his Majesty's reign, shall cease from the fifth day of April last; and that the said governor and company shall deliver to the said commissioners of stamps, within one calendar month after the passing of this act, and afterwards on the first day of May in every year whilst the present stamp duties shall remain in force, a just and true account, verified by the oath of their chief accountant, of the amount or value of all their promissory notes and bank post bills in circulation, on some given day in every week, for the space of three years preceding the sixth day of April in the year in which the account shall be delivered, together with the average amount or value thereof, according to such account; and that the said governor and company shall pay into the hands of the receiver-general of the stamp duties in Great Britain, as a composition for the duties which would otherwise have been payable for their promissory notes and bank post bills issued within the year, reckoning from the fifth day of April preceding the delivery of the said account, the sum of three thousand five hundred pounds for every million, and after that rate for half a million, but not for a less sum than half a million, of the said average amount or value of their said notes and bank post bills in circulation; and that one-half part of the sum so to be ascertained as aforesaid for each year's composition shall be paid on the first day of October, and the other half on the first day of April next after the delivery of such account as aforesaid.

Account of notes, &c.

Bank of England to pay composition for duties on bills and notes.

Composition made, when bank resume cash payments.

XXII. Provided always, and be it further enacted, that, upon the said governor and company resuming their payments in cash, a new arrangement for the composition for the stamp duties, payable on their promissory notes and bank post bills, shall be submitted to parliament.

The Bank and Royal Bank of Scotland, and British Linen Company, may issue small notes on unstamped paper, accounting for duties.

XXIII. And be it further enacted, that from and after the thirty-first day of August, one thousand eight hundred and fifteen, it shall be lawful for the governor and company of the Bank of Scotland, and the Royal Bank of Scotland, and the British Linen Company in Scotland, respectively, to issue their promissory notes for the sums of one pound, one guinea, two pounds, and two guineas, payable to the bearer on demand, on unstamped paper, in the same manner as they were authorized to do by the aforesaid act of the forty-eighth year of his Majesty's reign; they the said governor and company of the Bank of Scotland, and the Royal Bank of Scotland, and British Linen Company, respectively, giving such security, and keeping and producing true accounts of all the notes so to be issued by them respectively, and accounting for and paying the several duties payable in respect of such notes, in such and the

55 Geo. 3, c. 184.

same manner, in all respects, as is and are prescribed and required by the said last-mentioned act with regard to the notes thereby allowed to be issued by them on unstamped paper, and also to re-issue such promissory notes respectively, from time to time, after the payment thereof, as often as they shall think fit.

Re-issuable notes not issued by bankers or others, without licence.

XXIV. And be it further enacted, that from and after the tenth day of October, one thousand eight hundred and fifteen, it shall not be lawful for any banker or bankers, or other person or persons (except the governor and company of the Bank of England), to issue any promissory notes for money payable to the bearer on demand, hereby charged with a duty and allowed to be re-issued as aforesaid, without taking out a licence yearly for that purpose; which licence shall be granted by two or more of the said commissioners of stamps for the time being, or by some person authorized in that behalf by the said commissioners, or the major part of them, on payment of the duty charged thereon in the schedule hereunto annexed; and a separate and distinct licence shall be taken out for or in respect of every town or place where any such promissory notes shall be issued, by, or by any agent or agents for or on account of, any banker or bankers, or other person or persons; and every such licence shall specify the proper name or names, and place or places of abode, of the person or persons, or the proper name and description of any body corporate, to whom the same shall be granted, and also the name of the town or place where, and the name of the bank, as well as the partnership or other name, style or firm under which such notes are to be issued; and where any such licence shall be granted to persons in partnership, the same shall specify and set forth the names and places of abode of all the persons concerned in the partnership, whether all their names shall appear on the promissory notes to be issued by them or not; and, in default thereof, such licence shall be absolutely void; and every such licence which shall be granted between the tenth day of October and the eleventh day of November, in any year, shall be dated on the eleventh day of October; and every such licence which shall be granted at any other time shall be dated on the day on which the same shall be granted; and every such licence respectively shall have effect and continue in force from the day of the date thereof until the tenth day of October following, both inclusive.

Regulations respecting licences.

No banker to take out more than four licences for any number of towns in Scotland.

XXV. Provided always, and be it further enacted, that no banker or bankers, person or persons, shall be obliged to take out more than four licences in all for any number of towns or places in Scotland; and in case any banker or bankers, person or persons shall issue such promissory notes as aforesaid, by themselves or their agents, at more than four different towns or places in Scotland, then, after taking out three distinct licences for three of such towns or places, such banker or bankers, person or persons, shall be entitled to have all the rest of such towns or places included in a fourth licence.

55 Geo. 3, c. 184.

XXVI. Provided also, and be it further enacted, that, where any banker or bankers, person or persons applying for a licence under this act, would, under the said act of the forty-eighth (*a*) year of his Majesty's reign have been entitled to have two or more towns or places in England included in one licence, if this act had not been made, such banker or bankers, person or persons, shall have and be entitled to the like privilege under this act.

In what case several towns included in one licence.

XXVII. And be it further enacted, that the banker or bankers, or other person or persons, applying for any such licence as aforesaid, shall produce and leave with the proper officer a specimen of the promissory notes proposed to be issued by him or them, to the intent that the licence may be framed accordingly; and if any banker or bankers, or other person or persons (except the said governor and company of the Bank of England) shall issue or cause to be issued by any agent any promissory note for money payable to the bearer on demand, hereby charged with a duty, and allowed to be re-issued as aforesaid, without being licensed so to do in the manner aforesaid, or at any other town or place, or under any other name, style or firm than shall be specified in his or their licence, the banker or bankers, or other person or persons so offending, shall for every such offence forfeit the sum of one hundred pounds.

On applying for licences, specimens of notes delivered.

Issuing notes without licence.

Penalty.

XXVIII. And be it further enacted, that where any such licence as aforesaid shall be granted to any persons in partnership, the same shall continue in force for the issuing of promissory notes duly stamped, under the name, style or firm therein specified, until the tenth day of October inclusive, following the date thereof, notwithstanding any alteration in the partnership.

Licences to continue in force, notwithstanding alteration in partnerships.

XXIX. And be it further enacted, that from and after the passing of this act promissory notes for the payment of money to the bearer on demand, made out of Great Britain, or purporting to be made out of Great Britain, or purporting to be made by or on the behalf of any person or persons resident out of Great Britain, shall not be negotiable or be negotiated or circulated or paid in Great Britain, whether the same shall be made payable in Great Britain or not, unless the same shall have paid such duty, and be stamped in such manner, as the law requires for promissory notes of the like tenor and value made in Great Britain; and if any person or persons shall circulate or negotiate, or offer in payment, or shall receive or take in payment, any such promissory note, or shall demand or receive payment of the whole or any part of the money mentioned in such promissory note, from or on account of the drawer thereof, in Great Britain, the same not being duly stamped as aforesaid; or if any person or persons in Great Britain shall pay or cause to be paid the sum of money expressed in any such note, not being duly stamped as aforesaid, or any part thereof, either as drawer thereof, or in pursuance of any nomination or

Promissory notes made out of Great Britain not negotiable, unless stamped.

Circulating, &c., such notes, &c.

(*a*) 48 Geo. 3, c. 149, s. 17.

55 Geo. 3, c. 184.

appointment for that purpose therein contained, the person or persons so offending shall, for every such promissory note, forfeit the sum of twenty pounds: provided always, that this clause shall not extend to promissory notes made and payable only in Ireland.

Penalty.

Proviso for Ireland.

SCHEDULE.

	£	s.	d.
INLAND BILL OF EXCHANGE, draft or order to the bearer, or to order, either on demand or otherwise, not exceeding two months after date, or sixty days after sight, of any sum of money—			
Amounting to 40*s.*, and not exceeding 5*l.* 5*s.*	0	1	0
Exceeding 5*l.* 5*s.*, not exceeding 20*l.*	0	1	6
Exceeding 20*l.*, not exceeding 30*l.*	0	2	0
Exceeding 30*l.*, not exceeding 50*l.*	0	2	6
Exceeding 50*l.*, not exceeding 100*l.*	0	3	6
Exceeding 100*l.*, not exceeding 200*l.*	0	4	6
Exceeding 200*l.*, not exceeding 300*l.*	0	5	0
Exceeding 300*l.*, not exceeding 500*l.*	0	6	0
Exceeding 500*l.*, not exceeding 1,000*l.*	0	8	6
Exceeding 1,000*l.*, not exceeding 2,000*l.*	0	12	6
Exceeding 2,000*l.*, not exceeding 3,000*l.*	0	15	0
Exceeding 3,000*l.*	1	5	0
Inland bill of exchange, draft or order, for the payment to the bearer, or to order, at any time exceeding two months after date, or sixty days after sight, of any sum of money—			
Amounting to 40*s.*, and not exceeding 5*l.* 5*s.*	0	1	6
Exceeding 5*l.* 5*s.*, not exceeding 20*l.*	0	2	0
Exceeding 20*l.*, not exceeding 30*l.*	0	2	6
Exceeding 30*l.*, not exceeding 50*l.*	0	3	6
Exceeding 50*l.*, not exceeding 100*l.*	0	4	6
Exceeding 100*l.*, not exceeding 200*l.*	0	5	0
Exceeding 200*l.*, not exceeding 300*l.*	0	6	0
Exceeding 300*l.*, not exceeding 500*l.*	0	8	6
Exceeding 500*l.*, not exceeding 1,000*l.*	0	12	6
Exceeding 1,000*l.*, not exceeding 2,000*l.*	0	15	0
Exceeding 2,000*l.*, not exceeding 3,000*l.*	1	5	0
Exceeding 3,000*l.*	1	10	0
Inland bill, draft or order, for the payment of any sum of money, though not made payable to the bearer, or to order, if the same shall be delivered to the payee, or some person on his or her behalf—the same duty as on a bill of exchange for the like sum, payable to bearer or order.			
Inland bill, draft or order, for the payment of any sum of money, weekly, monthly, or at any other stated periods, if made payable to the bearer, or to order, or if delivered to the payee, or some person on his or her behalf, where the total amount of the money thereby made payable shall be specified therein, or can be			

55 Geo. 3, c. 184.

ascertained therefrom—the same duty as on a bill payable to bearer, or order on demand, for a sum equal to such total amount.

And where the total amount of the money thereby made payable shall be indefinite—the same duty as on a bill on demand, for the sum therein expressed only.

And the following instruments shall be deemed and taken to be inland bills, drafts or orders for the payment of money, within the intent and meaning of this schedule, viz.:

All drafts or orders for the payment of any sum of money, by a bill or promissory note, or for the delivery of any such bill or note in payment or satisfaction of any sum of money, where such drafts or orders shall require the payment or delivery to be made to the bearer, or to order, or shall be delivered to the payee, or some person on his or her behalf;

All receipts given by any banker or bankers, or other person or persons, for money received, which shall entitle, or be intended to entitle, the person or persons paying the money, or the bearer of such receipts, to receive the like sum from any third person or persons;

And all bills, drafts or orders for the payment of any sum of money out of any particular fund, which may or may not be available, or upon any condition or contingency which may or may not be performed or happen, if the same shall be made payable to the bearer, or to order, or if the same shall be delivered to the payee, or some person on his or her behalf.

	£	*s.*	*d.*
FOREIGN BILL OF EXCHANGE (or bill of exchange drawn in, but payable out of, Great Britain), if drawn singly, and not in a set—the same duty as on an inland bill of the same amount and tenor.			
Foreign bills of exchange, drawn in sets, according to the custom of merchants, for every bill of each set, where the sum made payable thereby shall not exceed 100*l.*	0	1	6
And where it shall exceed 100*l.*, and not exceed 200*l.*	0	3	0
Where it shall exceed 200*l.*, and not exceed 500*l.*	0	4	0
Where it shall exceed 500*l.*, and not exceed 1,000*l.*	0	5	0
Where it shall exceed 1,000*l.*, and not exceed 2,000*l.*	0	7	6
Where it shall exceed 2,000*l.*, and not exceed 3,000*l.*	0	10	0
Where it shall exceed 3,000*l.*	0	15	0

Exemptions from the preceding and all other Stamp Duties.

All bills of exchange, or bank post-bills, issued by the governor and company of the Bank of England.

All bills, orders, remittance bills, and remittance certificates, drawn by commissioned officers, masters, and

55 Geo. 3. c. 184.
35 Geo. 3, c. 49.

surgeons in the navy, or by any commissioner, or commissioners of the navy, under the authority of the act passed in the thirty-fifth year of his Majesty's reign, for the more expeditious payment of the wages and pay of certain officers belonging to the navy.

All bills drawn pursuant to any former act or acts of Parliament, by the commissioners of the navy, or by the commissioners for victualling the navy, or by the commissioners for managing the transport service, and for taking care of sick and wounded seamen, upon, and payable by, the treasurer of the navy.

All drafts or orders for the payment of any sum of money to the bearer on demand, and drawn upon any banker or bankers, or any person or persons acting as a banker, who shall reside, or transact the business of a banker, within ten miles of the place where such drafts or orders shall be issued, provided such place shall be specified in such drafts or orders, and provided the same shall bear date on or before the day on which the same shall be issued, and provided the same do not direct the payment to be made by bills or promissory notes.

All bills for the pay and allowances of his Majesty's land forces, or for other expenditures liable to be charged in the public regimental or district accounts, which shall be drawn according to the forms now prescribed, or hereafter to be prescribed, by his Majesty's orders, by the paymasters of regiments or corps, or by the chief paymaster, or deputy paymaster, and accountant of the army depôt, or by the paymasters of recruiting districts, or by the paymasters of detachments, or by the officer or officers authorized to perform the duties of the paymastership during a vacancy, or the absence, suspension, or incapacity, of any such paymaster, as aforesaid; save and except such bills as shall be drawn in favour of contractors, or others, who furnish bread or forage to his Majesty's troops, and who, by their contracts or agreements, shall be liable to pay the stamp duties on the bills given in payment for the articles supplied by them.

PROMISSORY NOTE, for the payment, to the bearer on demand, of any sum of money—

	£	s.	d.
Not exceeding 1*l.* 1*s.*	0	0	5
Exceeding 1*l.* 1*s.*, and not exceeding 2*l.* 2*s.*	0	0	10
Exceeding 2*l.* 2*s.*, and not exceeding 5*l.* 5*s.*	0	1	3
Exceeding 5*l.* 5*s.*, and not exceeding 10*l.*	0	1	9
Exceeding 10*l.*, and not exceeding 20*l.*	0	2	0
Exceeding 20*l.*, and not exceeding 30*l.*	0	3	0
Exceeding 30*l.*, and not exceeding 50*l.*	0	5	0
Exceeding 50*l.*, and not exceeding 100*l.*	0	8	6

Which said notes may be re-issued, after payment thereof, as often as shall be thought fit.

55 Geo. 3, c. 184.

	£	s.	d.
Promissory note for the payment, in any other manner than to the bearer on demand, but not exceeding two months after date, or sixty days after sight, of any sum of money—			
Amounting to 40*s.*, and not exceeding 5*l.* 5*s.* . .	0	1	0
Exceeding 5*l.* 5*s.*, and not exceeding 20*l.* . . .	0	1	6
Exceeding 20*l.*, and not exceeding 30*l.* . . .	0	2	0
Exceeding 30*l.*, and not exceeding 50*l.* . . .	0	2	6
Exceeding 50*l.*, and not exceeding 100*l.* . . .	0	3	6
These notes are not to be re-issued after being once paid.			
Promissory note for the payment, either to the bearer on demand, or in any other manner than to the bearer on demand, but not exceeding two months after date, or sixty days after sight, of any sum of money—			
Exceeding 100*l.*, and not exceeding 200*l.* . . .	0	4	6
Exceeding 200*l.*, and not exceeding 300*l.* . . .	0	5	0
Exceeding 300*l.*, and not exceeding 500*l.* . . .	0	6	0
Exceeding 500*l.*, and not exceeding 1,000*l.* . .	0	8	6
Exceeding 1,000*l.*, and not exceeding 2,000*l.* . .	0	12	6
Exceeding 2,000*l.*, and not exceeding 3,000*l.* . .	0	15	0
Exceeding 3,000*l.*	1	5	0
These notes are not to be re-issued after being once paid.			
Promissory note for the payment to the bearer or otherwise, at any time exceeding two months after date, or sixty days after sight, of any sum of money—			
Amounting to 40*s.*, and not exceeding 5*l.* 5*s.* . .	0	1	6
Exceeding 5*l.* 5*s.*, and not exceeding 20*l.* . . .	0	2	0
Exceeding 20*l.*, and not exceeding 30*l.* . . .	0	2	6
Exceeding 30*l.*, and not exceeding 50*l.* . . .	0	3	6
Exceeding 50*l.*, and not exceeding 100*l.* . . .	0	4	6
Exceeding 100*l.*, and not exceeding 200*l.* . . .	0	5	0
Exceeding 200*l.*, and not exceeding 300*l.* . . .	0	6	0
Exceeding 300*l.*, and not exceeding 500*l.* . . .	0	8	6
Exceeding 500*l.*, and not exceeding 1,000*l.* . .	0	12	6
Exceeding 1,000*l.*, and not exceeding 2,000*l.* . .	0	15	0
Exceeding 2,000*l.*, and not exceeding 3,000*l.* . .	1	5	0
Exceeding 3,000*l.*	1	10	0
These notes are not to be re-issued after being once paid.			
Promissory note for the payment of any sum of money by instalments, or for the payment of several sums of money at different days or times, so that the whole of the money to be paid shall be definite and certain.— The same duty as on a promissory note, payable in less than two months after date, for a sum equal to the whole amount of the money to be paid.			

55 Geo. 3, c. 184.

And the following instruments shall be deemed and taken to be promissory notes, within the intent and meaning of this schedule; viz.—

All notes promising the payment of any sum or sums of money out of any particular fund, which may or may not be available; or upon any condition or contingency, which may or may not be performed or happen; if the same shall be made payable to the bearer or to order, and if the same shall be definite and certain and not amount in the whole to twenty pounds;

And all receipts for money deposited in any bank, or in the hands of any banker or bankers, which shall contain any agreement or memorandum, importing that interest shall be paid for the money so deposited.

Exemptions from the Duties on Promissory Notes.

All notes, promising the payment of any sum or sums of money out of any particular fund, which may or may not be available, or upon any condition or contingency which may or may not be performed or happen, where the same shall not be made payable to the bearer or to order, and also where the same shall be made payable to the bearer or to order, if the same shall amount to twenty pounds, or be indefinite.

And all other instruments, bearing in any degree the form or style of promissory notes, but which in law shall be deemed special agreements, except those hereby expressly directed to be deemed promissory notes.

But such of the notes and instruments here exempted from the duty on promissory notes, shall nevertheless be liable to the duty which may attach thereon as agreements or otherwise.

Exemptions from the preceding and all other Stamp Duties.

All promissory notes for the payment of money issued by the Governor and Company of the Bank of England.

	£	s.	d.
PROTEST of any bill of exchange or promissory note, for any sum of money—			
Not amounting to 20*l.*	0	2	0
Amounting to 20*l.*, and not amounting to 100*l.*	0	3	0
Amounting to 100*l.*, and not amounting to 500*l.*	0	5	0
Amounting to 500*l.* or upwards	0	10	0
Protest of any other kind	0	5	0
And for every sheet or piece of paper, parchment, or vellum, upon which the same shall be written, after the first, a further progressive duty of	0	5	0

[58 Geo. 3, c. 93.]

An Act to afford Relief to the bonâ fide *Holders of Negotiable Securities, without Notice that they were given for a Usurious Consideration.*

58 Geo. 3, c. 93.

"Whereas by the laws now in force all contracts and assurances whatsoever, for payment of money, made for a usurious consideration are utterly void; and whereas, in the course of mercantile transactions, negotiable securities often pass into the hands of persons who have discounted the same without any knowledge of the original considerations for which the same were given; and the avoidance of such securities in the hands of such *bonâ fide* indorsees, without notice, is attended with great hardship and injustice;" for remedy thereof, be it enacted, by the King's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that no bill of exchange or promissory note that shall be drawn or made after the passing of this act, shall, though it may have been given for a usurious consideration or upon a usurious contract, be void in the hands of an indorsee for valuable consideration, unless such indorsee had, at the time of discounting or paying such consideration for the same, actual notice that such bill of exchange or promissory note had been originally given for a usurious consideration or upon a usurious contract.

Bill of exchange or promissory note given for a usurious consideration, not void in the hands of indorsee without notice.

[1 & 2 Geo. 4, c. 78.]

An Act to regulate Acceptances of Bills of Exchange.

1 & 2 Geo. 4, c. 78.

Whereas, according to law as hath been adjudged, where a bill is accepted payable at a bankers, the acceptance thereof is not a general but a qualified acceptance; and whereas a practice hath very generally prevailed among merchants and traders so to accept bills, and the same have, among such persons been very generally considered as bills generally accepted, and accepted without qualification: and whereas many persons have been and may be much prejudiced and misled by such practice and understanding, and persons accepting bills may relieve themselves from all inconvenience, by giving such notice as hereinafter mentioned of their intention to make only a qualified acceptance thereof: be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that from and after the first day of August now next ensuing, if any person shall accept a bill of exchange payable at the house of a banker or other place, without further expression in his acceptance, such acceptance shall be deemed and taken to be, to all intents and purposes, a general acceptance of such bill; but if the acceptor shall, in his acceptance, express that he accepts the bill payable at the banker's house or other

Bills accepted payable at a banker's or other place, deemed a general acceptance.

Bills accepted payable at a banker's or other place only, deemed a qualified acceptance.

1 & 2 Geo. 4, c. 78.

place only, and not otherwise or elsewhere, such acceptance shall be deemed and taken to be, to all intents and purposes, a qualified acceptance of such bill, and the acceptor shall not be liable to pay the said bill, except in default of payment when such payment shall have been first duly demanded at such banker's house or other place.

Acceptance to be in writing on the bill.

II. And be it further enacted, that, from and after the said first day of August, no acceptance of any inland bill of exchange shall be sufficient to charge any person, unless such acceptance be in writing on such bill, or if there be more than one part of such bill, on one of the said parts.

[7 & 8 Geo. 4, c. 15.]

An Act for declaring the Law in relation to Bills of Exchange and Promissory Notes becoming payable on Good Friday or Christmas Day.

7 & 8 Geo. 4, c. 15.

39 & 40 Geo. 3, c. 42.

"Whereas an act was passed in the thirty-ninth and fortieth years of the reign of his late Majesty King George the Third, intituled 'An Act for the better Observance of Good Friday in certain cases therein mentioned;' and it was thereby enacted, that where bills of exchange and promissory notes became due and payable on Good Friday, the same should, from and after the first day of June then next ensuing, be payable on the day before Good Friday; and that the holder or holders of such bills of exchange or promissory notes might note and protest the same for non-payment on the day preceding Good Friday, in like manner as if the same had fallen due and become payable on the day preceding Good Friday; and that such noting and protest should have the same effect and operation at law as if such bills and promissory notes had fallen due and become payable on the day preceding Good Friday, in the same manner as was usual in cases of bills of exchange and promissory notes coming due on the day before any Lord's Day, commonly called Sunday, and before the feast of the Nativity or birth-day of our Lord, commonly called Christmas Day; and whereas, notwithstanding the said recited act, and notwithstanding the general custom of merchants, doubts have arisen whether notice of the dishonour of bills of exchange and promissory notes falling due on any Good Friday, or on any Christmas Day, should not be given on such Good Friday or Christmas Day respectively, and whether in cases where bills of exchange and promissory notes fall due on the day preceding any Good Friday or Christmas Day, notice of the dishonour thereof should not be given on the Good Friday or the Christmas Day next after the same bills of exchange and promissory notes so fall due; and it is expedient that such doubts should be removed:" be it therefore declared and enacted, by the King's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled,

and by the authority of the same, that from and immediately after the tenth day of April, one thousand eight hundred and twenty-seven, in all cases where bills of exchange or promissory notes shall be payable either under or by virtue of the said recited act or otherwise on the day preceding any Good Friday, or on the day preceding any Christmas Day, it shall not be necessary for the holder or holders of such bills of exchange or promissory notes to give notice of the dishonour thereof until the day next after such Good Friday or Christmas Day; and that whenever Christmas Day shall fall on a Monday, it shall not be necessary for the holder or holders of such bills of exchange or promissory notes as shall be payable on the preceding Saturday, to give notice of the dishonour thereof until the Tuesday next after such Christmas Day; and that every such notice given as aforesaid shall be valid and effectual to all intents and purposes.

7 & 8 Geo. 4, c. 15.

Where bills of exchange, becoming due on the day preceding Good Friday or Christmas Day, are dishonoured, notice thereof may be given on the day after such Good Friday, &c.

II. And whereas similar doubts have existed with respect to bills of exchange and promissory notes falling due upon days appointed by his Majesty's proclamation for solemn fasts or days of thanksgiving, or upon the day next preceding such days respectively, and it is expedient that such doubts should be removed; be it therefore further declared and enacted, that from and after the said tenth day of April, one thousand eight hundred and twenty-seven, in all cases where bills of exchange or promissory notes shall become due and payable on any day appointed by his Majesty's proclamation for a day of solemn fast or a day of thanksgiving, the same shall be payable on the day next preceding such day of fast or day of thanksgiving, and in case of nonpayment may be noted and protested on such preceding day; and that as well in such cases as in the case of bills of exchange and promissory notes becoming due and payable on the day preceding any such day of fast or day of thanksgiving, it shall not be necessary for the holder or holders of such bills of exchange and promissory notes to give notice of the dishonour thereof until the day next after such day of fast or day of thanksgiving; and that whensoever such day of fast or day of thanksgiving shall be appointed on a Monday, it shall not be necessary for the holder or holders of such bills of exchange or promissory notes as shall be payable on the preceding Saturday, to give notice of the dishonour thereof until the Tuesday next after such day of fast or day of thanksgiving respectively, and that every such notice, so given as aforesaid, shall be valid and effectual to all intents and purposes.

Bills of exchange becoming due on fast or thanksgiving days, to be payable on the day next preceding such fast or thanksgiving day.

III. And be it further enacted, that from and after the said tenth of April, one thousand eight hundred and twenty-seven, Good Friday and Christmas Day, and every such day of fast or thanksgiving so appointed by his Majesty, is and shall for all other purposes whatever, as regards bills of exchange and promissory notes, be treated and considered as the Lord's Day commonly called Sunday.

Good Friday, Christmas Day, &c., as regards bills of exchange to be treated as the Lord's Day.

7 & 8 Geo. 4, c. 15.

Act not to extend to Scotland.

IV. Provided always and be it further enacted, that nothing in this act contained shall extend or be construed to extend to that part of the United Kingdom called Scotland.

[9 Geo. 4, c. 14, ss. 1, 3, 4, 5, 8.]

An Act for rendering a written Memorandum necessary to the Validity of certain Promises and Engagements.

9 Geo. 4, c. 14.

English act, 21 Jac. 1, c. 16.

Irish act, 10 Car. 1, sess. 2, c. 6.

"Whereas, by an act passed in England, in the twenty-first year of the reign of King James the First, it was, among other things, enacted, that all actions of account and upon the case, other than such accounts as concern the trade of merchandize between merchant and merchant, their factors or servants, all actions of debt grounded upon any lending or contract without specialty, and all actions of debt for arrearages of rent, should be commenced within three years after the end of the then present session of parliament, or within six years next after the cause of such actions or suit, and not after: and whereas a similar enactment is contained in an act passed in Ireland, in the tenth year of the reign of King Charles the First; and whereas various questions have arisen in actions founded on simple contract, as to the proof and effect of acknowledgments and promises offered in evidence for the purpose of taking cases out of the operation of the said enactments; and it is expedient to prevent such questions, and to make provision for giving effect to the said enactments; and to the intention thereof:" be it therefore enacted, by the King's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that, in actions of

In actions of debt or upon the case, no acknowledgment shall be deemed sufficient, unless it be in writing, or by part payment.

debt or upon the case, grounded upon any simple contract, no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the said enactments or either of them, or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing, to be signed by the party chargeable thereby; and that where there shall be two or more joint contractors, or executors or administrators of any contractor, no such joint contractor, executor or administrator, shall lose the benefit of the said enactments or either of them, so as to be chargeable in respect or by reason only of any written acknowledgment or promise made and

Joint contractors.

signed by any other or others of them; provided always, that nothing herein contained shall alter, or take away or lessen the effect of any payment of any principal or interest made by any

Proviso for the case of joint contractors.

person whatsoever; provided also, that in actions to be commenced against two or more such joint contractors, or executors or administrators, if it shall appear, at the trial or otherwise, that the plaintiff, though barred by either of the said recited acts or this act, as to one or more of such joint contractors, or exe-

cutors or administrators, shall nevertheless be entitled to recover against any other or others of the defendants, by virtue of a new acknowledgment or promise, or otherwise, judgment may be given and costs allowed for the plaintiff as to such defendant or defendants against whom he shall recover, or for the other defendant or defendants, against the plaintiff. 9 Geo. 4, c. 14.

III. And be it further enacted, that no indorsement or memorandum of any payment, written or made after the time appointed for this act to take effect, upon any promissory note, bill of exchange, or other writing, by or on the behalf of the party to whom such payment shall be made, shall be deemed sufficient proof of such payment, so as to take the case out of the operation of either of the said statutes. Indorsements of payment.

IV. And be it further enacted, that the said recited acts, and this act, shall be deemed and taken to apply to the case of any debt on simple contract alleged by way of set-off on the part of any defendant, either by plea, notice or otherwise. Simple contract debts alleged by way of set-off.

V. And be it further enacted, that no action shall be maintained whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification after full age of any promise or simple contract made during infancy, unless such promise or ratification shall be made by some writing signed by the party to be charged therewith. Confirmation of promises made by infants.

VIII. And be it further enacted, that no memorandum or other writing, made necessary by this act, shall be deemed to be an agreement within the meaning of any statute relating to the duties of stamps. Memorandums exempted from stamps.

[2 & 3 Will. 4, c. 98.]

An Act for regulating the Protesting for Nonpayment of Bills of Exchange drawn payable at a Place not being the Place of the Residence of the Drawee or Drawees of the same.

"Whereas doubts having arisen as to the place in which it is requisite to protest for nonpayment bills of exchange, which on the presentment for acceptance to the drawee or drawees shall not have been accepted, such bills of exchange being made payable at a place other than the place mentioned therein to be the residence of the drawee or drawees thereof, and it is expedient to remove such doubts;" be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, That from and after the passing of this act all bills of exchange wherein the 2 & 3 Will. 4, c. 98.

Bills of exchange expressed to be

2 & 3 Will. 4, c. 98.

drawer or drawers thereof shall have expressed that such bills of exchange are to be payable in any place other than the place by him or them therein mentioned to be the residence of the drawee or drawees thereof, and which shall not on the presentment for acceptance thereof be accepted, shall or may be, without further presentment to the drawee or drawees, protested for non-payment in the place in which such bills of exchange shall have been by the drawer or drawers expressed to be payable, unless the amount owing upon such bills of exchange shall have been paid to the holder or holders thereof on the day on which such bills of exchange would have become payable, had the same been duly accepted.

paid in any place other than the residence of the drawee, if not accepted on presentment, may be protested in that place, unless amount paid to the holder.

[3 & 4 Will. 4, c. 42, ss. 12, 28, 29.]

An Act for the further Amendment of the Law and the better Advancement of Justice.

3 & 4 Will. 4, c. 42.

XII. And be it further enacted, that, in all actions upon bills of exchange or promissory notes or other written instruments, any of the parties to which are designated by the initial letter or letters, or some contraction of the christian or first name or names, it shall be sufficient in every affidavit to hold to bail, and in the process or declaration to designate, such persons by the same initial letter or letters, or contraction of the christian or first name or names, instead of stating the christian or first name or names in full.

Initials of names may be used in some cases.

Jury empowered to allow interest upon debts.

XXVIII. And be it further enacted, that upon all debts or sums certain, payable at a certain time or otherwise, the jury, on the trial of any issue or on any inquisition of damages, may, if they shall think fit, allow interest to the creditor at a rate not exceeding the current rate of interest from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time, or, if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the term of payment; provided that interest shall be payable in all cases in which it is now payable by law.

In certain actions the jury may give damages in the nature of interest.

XXIX. And be it further enacted, that the jury, on the trial of any issue or on any inquisition of damages, may, if they shall think fit, give damages in the nature of interest over and above the value of the goods at the time of the conversion or seizure, in all actions of trover or trespass *de bonis asportatis*, and over and above the money recoverable in all actions on policies of assurance made after the passing of this act.

[5 & 6 Will. 4, c. 41.]

An Act to amend the Law relating to Securities given for Considerations arising out of Gaming, usurious and certain other illegal Transactions.

5 & 6 Will. 4, c. 41.

"Whereas by an act passed in the sixteenth year of the reign of his late Majesty King Charles the Second, and by an act passed in the parliament of Ireland in the tenth year of the reign of his late Majesty King William the Third, each of such acts being intituled 'An Act against deceitful, disorderly and excessive Gaming,' it was enacted, that all and singular judgments, statutes, recognizances, mortgages, conveyances, assurances, bonds, bills, specialties, promises, covenants, agreements and other acts, deeds and securities whatsoever, which should be obtained, made, given, acknowledged or entered into for security or satisfaction of or for any money or other thing lost at play or otherwise as in the said acts respectively is mentioned, or for any part thereof, should be utterly void and of none effect: and whereas by an act passed in the ninth year of the reign of her late Majesty Queen Anne, and also by an act passed in the parliament of Ireland in the eleventh year of the reign of her late majesty, each of such acts being intituled 'An Act for the better preventing of excessive and deceitful Gaming,' it was enacted, that from and after the several days therein respectively mentioned all notes, bills, bonds, judgments, mortgages or other securities or conveyances whatsoever, given, granted, drawn or entered into or executed by any person or persons whatsoever, where the whole or any part of the consideration of such conveyances or securities should be for any money or other valuable thing whatsoever won by gaming or playing at cards, dice, tables, tennis, bowls or other game or games whatsoever, or by betting on the sides or hands of such as did game at any of the games aforesaid, or for the reimbursing or repaying any money knowingly lent or advanced for such gaming or betting as aforesaid, or lent or advanced at the time and place of such play to any person or persons so gaming or betting as aforesaid, or that should, during such play, so play or bet, should be utterly void, frustrate and of none effect to all intents and purposes whatsoever: and that where such mortgages, securities or other conveyances should be of lands, tenements or hereditaments, or should be such as should incumber or affect the same, such mortgages, securities or other conveyances should enure and be to and for the sole use and benefit of and should devolve upon such person or persons as should or might have or be entitled to such lands or hereditaments in case the said grantor or grantors thereof or the person or persons so incumbering the same had been naturally dead, and as if such mortgages, securities or other conveyances had been made to such person or persons so to be entitled after the decease of the person or persons so incumbering the same; and that all grants or conveyances to be made for the preventing of such lands, tenements or hereditaments from coming to or devolving upon such person or persons thereby intended to enjoy the same as aforesaid should be deemed fraudulent and void

16 Car. 2, c. 7.

10 Will. 3 (I.)

9 Ann. c. 14.

11 Ann. (I.)

5 & 6 Will 4, c. 41.

and of none effect to all intents and purposes whatsoever: and whereas by an act passed in the twelfth year of the reign of her

12 Ann. st. 2, c. 16.

said late Majesty Queen Anne, intituled 'An Act to reduce the Rate of Interest without any Prejudice to Parliamentary Securities,' it was enacted, that all bonds, contracts and assurances whatsoever made after the twenty-ninth day of September, one thousand seven hundred and fourteen, for payment of any principal or money to be lent or covenanted to be performed upon or for any usury, whereupon or whereby there should be reserved or taken above the rate of five pounds in the hundred, as therein mentioned, should be utterly void: and whereas by an act passed in the parliament of Ireland in the fifth year of the reign of his

5 Geo. 2 (I.)

late Majesty King George the Second, intituled 'An Act for reducing the Interest of Money to Six per Cent.,' it was enacted, that all bonds, contracts and assurances whatsoever made after the first day of May, one thousand seven hundred and thirty-two, for payment of any principal or money to be lent or covenant to be performed upon or for any loan, whereupon or whereby there should be taken or reserved above the rate of six pounds in the hundred, should be utterly void: and whereas by an act passed in the fifty-eighth year of the reign of his late Majesty King George

58 Geo. 3, c. 93.

the Third, intituled 'An Act to afford Relief to the bonâ fide Holders of Negotiable Securities without Notice that they were given for a usurious Consideration,' it was enacted, that no bill of exchange or promissory note that should be drawn or made after the passing of that act should, though it might have been given for a usurious consideration or upon a usurious contract, be void in the hands of an indorsee for valuable consideration, unless such indorsee had at the time of discounting or paying such consideration for the same actual notice that such bill of exchange or promissory note had been originally given for a usurious consideration or upon a usurious contract: and whereas by an act passed in the parliament of Ireland in the eleventh and twelfth years of the reign of his said late Majesty King George the Third, intituled

11 & 12 Geo. 3 (I.)

'An Act to prevent Frauds committed by Bankrupts,' it was enacted, that every bond, bill, note, contract, agreement or other security whatsoever to be made or given by any bankrupt or by any other person unto or to the use of or in trust for any creditor or creditors, or for the security of the payment of any debt or sum of money due from such bankrupt at the time of his becoming bankrupt, or any part thereof, between the time of his becoming bankrupt and such bankrupt's discharge, as a consideration or to the intent to persuade him, her or them to consent to or sign any such allowance or certificate, should be wholly void and of no effect, and the monies there secured or agreed to be paid should not be recovered or recoverable: and whereas by an act passed in the forty-fifth year of the reign of his said late Majesty King

45 Geo. 3. c. 72.

George the Third, intituled 'An Act for the Encouragement of Seamen, and for the better and more effectually manning his Majesty's Navy during the present War,' it was enacted, that all contracts and agreements which should be entered into, and all bills, notes and other securities which should be given by any

person or persons for ransom of any ship or vessel, or of any merchandize or goods on board the same, contrary to that act, should be absolutely null and void in law, and of no effect whatsoever: and whereas by an act passed in the sixth year of the reign of his late Majesty King George the Fourth, intituled 'An Act to amend the Laws relating to Bankrupts,' it was enacted, that any contract or security made or given by any bankrupt or other person unto or in trust for any creditor, or for securing the payment of any money due by such bankrupt at his bankruptcy, as a consideration or with intent to persuade such creditor to consent to or sign the certificate of any such bankrupt, should be void, and the money thereby secured or agreed to be paid should not be recoverable, and the party sued on such contract or security might plead the general issue, and give that act and the special matter in evidence: and whereas securities and instruments made void by virtue of the several hereinbefore recited acts of the sixteenth year of the reign of his said late Majesty King Charles the Second, the tenth year of the reign of his said late Majesty King William the Third, the ninth and eleventh years of the reign of her said late Majesty Queen Anne, the eleventh and twelfth years of the reign of his said late Majesty King George the Third, the forty-fifth year of the reign of his said late Majesty King George the Third, and the sixth year of the reign of his said late Majesty King George the Fourth, and securities and instruments made void by virtue of the said act of the twelfth year of the reign of her said late Majesty Queen Anne, and the fifth year of the reign of his said late Majesty King George the Second, other than bills of exchange or promissory notes made valid by the said act of the fifty-eighth year of the reign of his late Majesty King George the Third, are sometimes indorsed, transferred, assigned or conveyed to purchasers or other persons for a valuable consideration, without notice of the original consideration for which such securities or instruments were given; and the avoidance of such securities or instruments in the hands of such purchasers or other persons is often attended with great hardship and injustice:" for remedy thereof be it enacted by the King's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, That so much of the hereinbefore recited acts of the sixteenth year of the reign of his said late Majesty King Charles the Second, the tenth year of the reign of his said late Majesty King William the Third, the ninth, eleventh and twelfth years of the reign of her said late Majesty Queen Anne, the fifth year of the reign of his said late Majesty King George the Second, the eleventh and twelfth and the forty-fifth years of the reign of his said late Majesty King George the Third, and the sixth year of the reign of his said late Majesty King George the Fourth, as enacts that any note, bill or mortgage shall be absolutely void, shall be and the same is hereby repealed; but nevertheless every note, bill or mortgage which if this act had not been passed would, by virtue of the said several lastly hereinbefore

5 & 6 Will. 4, c. 41.

6 Geo. 4, c. 16.

Securities given for considerations arising out of illegal transactions not to be void, to be deemed to have been given for an illegal consideration.

5 & 6 Will. 4, c. 41.

mentioned acts or any of them, have been absolutely void, shall be deemed and taken to have been made, drawn, accepted, given or executed for an illegal consideration, and the said several acts shall have the same force and effect which they would respectively have had if, instead of enacting that any such note, bill or mortgage should be absolutely void, such acts had respectively provided that every such note, bill or mortgage should be deemed and taken to have been made, drawn, accepted, given or executed for an illegal consideration: provided always, that nothing herein contained shall prejudice or affect any note, bill or mortgage which would have been good and valid if this act had not been passed.

Money paid to the holder of such securities shall be deemed to be paid on account of the person to whom the same was originally given.

II. And be it further enacted, that in case any person shall after the passing of this act, make, draw, give or execute any note, bill or mortgage for any consideration on account of which the same is by the hereinbefore recited acts of the sixteenth year of the reign of his said late Majesty King Charles the Second, the tenth year of the reign of his said late Majesty King William the Third, and the ninth and eleventh years of the reign of her said late Majesty Queen Anne, or by any one or more of such acts, declared to be void, and such person shall actually pay to any indorsee, holder or assignee of such note, bill or mortgage the amount of the money thereby secured, or any part thereof, such money so paid shall be deemed and taken to have been paid for and on account of the person to whom such note, bill or mortgage was originally given upon such illegal consideration as aforesaid, and shall be deemed and taken to be a debt due and owing from such last-named person to the person who shall have so paid such money, and shall accordingly be recoverable by action at law in any of his Majesty's courts of record.

Repealing so much of recited acts of 9 & 11 Ann. as enacts that securities shall enure for the benefit of parties in remainder.

III. And be it further enacted, that so much of the said acts of the ninth and eleventh years of the reign of her said late Majesty Queen Anne as enacts that where such mortgages, securities or other conveyances as therein mentioned should be of lands, tenements or hereditaments, or should be such as should incumber or affect the same, such mortgages, securities or other conveyances should enure and be to and for the sole use and benefit of and should devolve upon such person or persons as should or might have or be entitled to such lands or hereditaments in case the grantor or grantors thereof, or the person or persons incumbering the same, had been naturally dead, and as if such mortgages, securities or other conveyances had been made to such person or persons so to be entitled after the decease of the person or persons so incumbering the same, and that all grants or conveyances to be made for the preventing of such lands, tenements or hereditaments from coming to or devolving upon such person or persons thereby intended to enjoy the same as aforesaid, should be deemed fraudulent and void, and of none effect to all intents and purposes whatsoever, shall be and the same is hereby repealed; saving to all

persons all rights acquired by virtue thereof previously to the passing of this act. 5 & 6 Will. 4. c. 41.

IV. And be it further enacted, that this act may be altered or repealed by any other act during this present session of parliament. Act may be altered this session.

[6 & 7 Will. 4, c. 58.]

An Act for declaring the Law as to the Day on which it is requisite to present for Payment to the Acceptors or Acceptor supra Protest ***for Honour, or to the Referees or Referee in case of Need, Bills of Exchange which had been dishonoured.***

6 & 7 Will. 4, c. 58.

"Whereas bills of exchange are occasionally accepted supra protest for honour or have a reference thereon in case of need: and whereas doubts have arisen when bills have been protested for want of payment as to the day on which it is requisite that they should be presented for payment to the acceptors or acceptor for honour, or to the referees or referee, and it is expedient that such doubts should be removed;" be it therefore declared and enacted by the King's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, That it shall not be necessary to present such bills of exchange to such acceptors or acceptor for honour, or to such referees or referee, until the day following the day on which such bills of exchange shall become due; and that if the place of address on such bill of exchange of such acceptors or acceptor for honour, or of such referees or referee, shall be in any city, town, or place, other than in the city, town, or place where such bill shall be therein made payable, then it shall not be necessary to forward such bill of exchange for presentment for payment to such acceptors or acceptor for honour, or referees or referee, until the day following the day on which such bill of exchange shall become due.

Bills of exchange need not be presented to acceptors for honour or referees till the day following the day on which they become due.

II. And be it further enacted and declared, that if the day following the day on which such bill of exchange shall become due shall happen to be a Sunday, Good Friday, or Christmas Day, or a day appointed by his Majesty's proclamation for solemn fast or of thanksgiving, then it shall not be necessary that such bill of exchange shall be presented for payment, or be forwarded for such presentment for payment, to such acceptors or acceptor for honour, or referees or referee, until the day following such Sunday, Good Friday, Christmas Day, or solemn fast or day of thanksgiving.

If the following day be a Sunday, &c., then on the day following such Sunday, &c.

[1 & 2 Vict. c. 110.]

An Act for abolishing Arrest on Mesne Process in Civil Actions, except in certain Cases; for extending the Remedies of Creditors against the Property of Debtors; and for amending the Laws for the Relief of Insolvent Debtors in England. [16 August, 1838.]

1 & 2 Vict. c. 110.

Sheriff empowered to seize money, bank notes, &c.;

and to pay money or bank notes to execution creditor;

and to sue for amount secured by bills of exchange and other securities.

Proviso as to indemnity for sheriff.

XII. And be it enacted, that by virtue of any writ of fieri facias to be sued out of any superior or inferior court after the time appointed for the commencement of this act, or any precept in pursuance thereof, the sheriff or other officer having the execution thereof may and shall seize and take any money or bank notes, (whether of the governor and company of the Bank of England, or of any other bank or bankers,) and any cheques, bills of exchange, promissory notes, bonds, specialties, or other securities for money, belonging to the person against whose effects such writ of fieri facias shall be sued out; and may and shall pay or deliver to the party suing out such execution any money or bank notes which shall be so seized or a sufficient part thereof; and may and shall hold any such cheques, bills of exchange, promissory notes, bonds, specialties, or other securities for money as a security or securities for the amount of such writ of fieri facias directed to be levied, or so much thereof as shall not have been otherwise levied and raised: and may sue in the name of such sheriff or other officer for the recovery of the sum or sums secured thereby, if and when the time of payment thereof shall have arrived; and that the payment to such sheriff or other officer by the party liable on any such cheque, bill of exchange, promissory note, bond, specialty, or other security, with or without suit, or the recovery and levying execution against the party so liable, shall discharge him to the extent of such payment, or of such recovery and levy in execution, as the case may be, from his liability on any such cheque, bill of exchange, promissory note, bond, specialty, or other security; and such sheriff or other officer may and shall pay over to the party suing out such writ the money so to be recovered, or such part thereof as shall be sufficient to discharge the amount by such writ directed to be levied; and if after satisfaction of the amount so to be levied, together with sheriff's poundage and expenses, any surplus shall remain in the hands of such sheriff or other officer, the same shall be paid to the party against whom such writ shall be so issued; provided that no such sheriff or other officer shall be bound to sue any party liable upon any such cheque, bill of exchange, promissory note, bond, specialty, or other security, unless the party suing out such execution shall enter into a bond, with two sufficient sureties, for indemnifying him from all costs and expenses to be incurred in the prosecution of such action, or to which he may become liable in consequence thereof, the expense of such bond to be deducted out of any money to be recovered in such action.

Securities not realized to be re-

XVI. And be it enacted, that if any judgment creditor, who, under the powers of this act shall have obtained any charge or be

entitled to the benefit of any security whatsoever, shall afterwards and before the property so charged or secured shall have been converted into money or realized, and the produce thereof applied towards payment of the judgment debt, cause the person of the judgment debtor to be taken or charged in execution upon such judgment, then and in such case such judgment creditor shall be deemed and taken to have relinquished all right and title to the benefit of such charge or security, and shall forfeit the same accordingly.

1 & 2 Vict. c. 110.

linquished if the person taken in execution.

XVII. And be it enacted, that every judgment debt shall carry interest at the rate of four pounds per centum per annum from the time of entering up the judgment, or from the time of the commencement of this act in cases of judgments then entered up and not carrying interest, until the same shall be satisfied; and such interest may be levied under a writ of execution on such judgment.

Judgment debts to carry interest.

[2 & 3 Vict. c. 29.]

An Act for the better Protection of Parties dealing with Persons liable to the Bankrupt Laws.

[19th July, 1839.]

Whereas by an act passed in the sixth year of the reign of his late Majesty King George the Fourth, intituled "An Act to amend the Laws relating to Bankrupts," it was among other things enacted, that all payments really and bonâ fide made by any bankrupt or by any person on his behalf, before the date and issuing of the commission against such bankrupt, to any creditor of such bankrupt (such payment not being a fraudulent preference of such creditor), should be deemed valid, notwithstanding any prior act of bankruptcy by such bankrupt committed, and that all payments really and bonâ fide made to any bankrupt before the date and issuing of the commission against such bankrupt should be deemed valid, notwithstanding any prior act of bankruptcy committed, and that such creditor should not be liable to refund the same to the assignees of such bankrupt, provided the person so dealing with the bankrupt had not at the time of such payment to such bankrupt notice of any bankruptcy committed: and whereas by an act passed in this present session of parliament, intituled "An Act for the better Protection of Purchasers against Judgments, Crown Debts, Lis pendens, and Fiats in bankruptcy," it is amongst other things enacted, that all conveyances by any bankrupt bonâ fide made and executed before the date and issuing of the fiat against such bankrupt, shall be valid, notwithstanding any prior act of bankruptcy by him committed, provided the person or persons to whom such bankrupt so conveyed had not at the time of such conveyance notice of any prior act of bankruptcy by him committed; and whereas it is expedient that further protection should be given to persons dealing with bankrupts before the

2 & 3 Vict. c. 29.

6 Geo. 4, c. 16.

2 Vict. c. 11.

2 & 3 Vict. c. 29.

issuing of any fiat against them: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same,

All contracts, &c., bonâ fide made by and with any bankrupt previous to the date and issuing of any fiat to be valid, &c., if no notice had of prior bankruptcy.

That all contracts, dealings and transactions, by and with any bankrupt really and bonâ fide made and entered into before the date and issuing of the fiat against him, and all executions and attachments against the lands and tenements or goods and chattels of such bankrupt, bonâ fide executed or levied before the date and issuing of the fiat, shall be deemed to be valid, notwithstanding any prior act of bankruptcy by such bankrupt committed; provided the person or persons so dealing with such bankrupt, or at whose suit or on whose account such execution or attachment shall have issued, had not at the time of such contract, dealing, or transaction, or at the time of executing or levying such execution or attachment, notice of any prior act of bankruptcy by him committed: provided also, that nothing herein contained shall be deemed or taken to give validity to any payment made by any bankrupt being a fraudulent preference of any creditor or creditors of such bankrupt, or to any execution founded on a judgment on a warrant of attorney or cognovit given by any bankrupt by way of such fraudulent preference.

Act may be repealed, &c.

II. And be it further enacted, that this act may be repealed or altered by any other act in this present session of parliament.

[2 & 3 Vict. c. 37.]

An Act to amend, and extend until the First day of January, One thousand eight hundred and forty-two, the Provisions of an Act of the First Year of her present Majesty, for exempting certain Bills of Exchange and Promissory Notes from the Operation of the Laws relating to Usury. [29th July, 1839.]

2 & 3 Vict. c. 37.

7 Will. 4 & 1 Vict. c. 80.

Whereas by an act passed in the first year of the reign of her present Majesty, intituled "An Act to exempt certain Bills of Exchange and Promissory Notes, from the Operation of the Laws relating to Usury," it was enacted, that bills of exchange payable at or within twelve months should not be liable, for a limited time, to the laws for the prevention of usury: and whereas the duration of the said act was limited to the first day of January, one thousand eight hundred and forty; and it is expedient that the provisions of the said act should be extended: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the

Bills of exchange and contracts for loans or forbearance of money above 10*l.* not to

same, That from and after the passing of this act no bill of exchange or promissory note made payable at or within twelve months after the date thereof, or not having more than twelve months to run, nor any contract for the loan or forbearance of

money, above the sum of ten pounds sterling, shall, by reason of any interest taken thereon or secured thereby, or any agreement to pay or receive or allow interest in discounting, negotiating or transferring any such bill of exchange or promissory note, be void, nor shall the liability of any party to any such bill of exchange or promissory note, nor the liability of any person borrowing any sum of money as aforesaid, be affected, by reason of any statute or law in force for the prevention of usury; nor shall any person or persons or body corporate drawing, accepting, indorsing, or signing any such bill or note, or lending or advancing or forbearing any money as aforesaid, or taking more than the present rate of legal interest, in Great Britain and Ireland respectively, for the loan or forbearance of money as aforesaid, be subject to any penalties under any statute or law relating to usury, or any other penalty or forfeiture; anything in any law or statute relating to usury, or any other law whatsoever in force in any part of the United Kingdom, to the contrary notwithstanding: provided always, that nothing herein contained shall extend to the loan or forbearance of any money upon security of any lands, tenements or hereditaments, or any estate or interest therein.

2 & 3 Vict. c. 37. be affected by the usury laws.

II. Provided always, and be it enacted, that nothing in this act contained shall be construed to enable any person or persons to claim, in any court of law or equity, more than five per cent. interest on any account or on any contract or engagement, notwithstanding they may be relieved from the penalties against usury, unless it shall appear to the Court that any different rate of interest was agreed to between the parties.

Five per cent. to be considered the legal rate of interest, except, &c.

III. Provided always, and be it enacted, that nothing herein contained shall extend or be construed to extend to repeal or affect any statute relating to pawnbrokers, but that all laws touching and concerning pawnbrokers shall remain in full force and effect, to all intents and purposes whatsoever, as if this act had not been passed.

Not to affect the law as to pawnbrokers.

IV. And be it enacted, that this act shall continue in force until the first day of January, one thousand eight hundred and forty-two.

Continuance of act.

V. And be it enacted, that this act may be amended or repealed by any act to be passed in this session of parliament.

Act may be amended, &c.

[*Continued by the* 3 *&* 4 *Vict. c.* 83; 4 *&* 5 *Vict. c.* 54; 6 *&* 7 *Vict. c.* 45; 8 *&* 9 *Vict. c.* 102, *and by* 13 *&* 14 *Vict. c.* 56, *to the* 1*st January*, 1856.]

[7 & 8 Vict. c. 32.]

An Act to regulate the Issue of Bank Notes, and for giving to the Governor and Company of the Bank of England certain Privileges for a limited Period.

[19th July, 1844.]

7 & 8 Vict. c. 32.

All persons may demand of the issue department notes for gold bullion.

IV. And be it enacted, that from and after the thirty-first day of August, one thousand eight hundred and forty-four, all persons shall be entitled to demand, from the Issue Department of the Bank of England, Bank of England notes in exchange for gold bullion at the rate of three pounds seventeen shillings and nine-pence per ounce of standard gold: provided always, that the said governor and company shall in all cases be entitled to require such gold bullion to be melted and assayed by persons approved by the said governor and company at the expense of the parties tendering such gold bullion.

No new bank of issue.

X. And be it enacted, that, from and after the passing of this act, no person other than a banker who, on the sixth day of May, one thousand eight hundred and forty-four, was lawfully issuing his own bank notes shall make or issue bank notes in any part of the United Kingdom.

Restriction against issue of bank notes.

XI. And be it enacted, that from and after the passing of this act it shall not be lawful for any banker to draw, accept, make or issue, in England or Wales, any bill of exchange or promissory note or engagement for the payment of money payable to bearer on demand, or to borrow, owe, or take up, in England or Wales, any sums or sum of money on the bills or notes of such banker payable to bearer on demand, save and except that it shall be lawful for any banker who was on the sixth day of May, one thousand eight hundred and forty-four, carrying on the business of a banker in England or Wales, and was then lawfully issuing, in England or Wales, his own bank notes, under the authority of a licence to that effect, to continue to issue such notes to the extent and under the conditions hereinafter mentioned, but not further or otherwise; and the right of any company or partnership to continue to issue such notes shall not be in any manner prejudiced or affected by any change which may hereafter take place in the personal composition of such company or partnership, either by the transfer of any shares or share therein, or by the admission of any new partner or member thereto, or by the retirement of any present partner or member therefrom: provided always, that it shall not be lawful for any company or partnership now consisting of only six or less than six persons to issue bank notes at any time after the number of partners therein shall exceed six in the whole.

Bankers ceasing to issue notes may not resume.

XII. And be it enacted, that if any banker, in any part of the United Kingdom, who after the passing of this act shall be entitled to issue bank notes shall become bankrupt or shall cease to carry

on the business of a banker, or shall discontinue the issue of bank notes, either by agreement with the governor and company of the Bank of England or otherwise, it shall not be lawful for such banker at any time thereafter to issue any such notes. 7 & 8 Vict. c. 32.

XXVI. And be it enacted, that, from and after the passing of this act, it shall be lawful for any society or company or any persons in partnership, though exceeding six in number, carrying on the business of banking in London, or within sixty-five miles thereof, to draw, accept or indorse bills of exchange, not being payable to bearer on demand, anything in the hereinbefore recited act passed in the fourth year of the reign of his said Majesty King William the Fourth, or in any other act, to the contrary notwithstanding. Banks within sixty-five miles of London may accept, &c. bills.

[16 & 17 Vict. c. 59.]

An Act to repeal certain Stamp Duties, and to grant others in lieu thereof, to amend the Laws relating to Stamp Duties, and to make perpetual certain Stamp Duties in Ireland. [4th August, 1853.]

Whereas it is expedient to repeal the stamp duties now payable in respect of the several instruments, matters, and things mentioned or described in the schedule to this act annexed, and to impose other stamp duties in lieu thereof; and it is also expedient to amend the laws relating to the stamp duties: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, as follows: 16 & 17 Vict. c. 59.

1. From and after the tenth day of October, one thousand eight hundred and fifty-three, the several stamp duties now payable in Great Britain and Ireland respectively, under or by virtue of any act or acts of Parliament for or in respect of the several instruments, matters, and things mentioned or described (otherwise than by way of exception) in the schedule to this act annexed, and whereon other duties are by this act granted, shall respectively cease and determine, and shall be and the same are hereby repealed; and in lieu and instead thereof there shall be granted, raised, levied, collected, and paid in and throughout the United Kingdom of Great Britain and Ireland, to and to the use of her Majesty, her heirs and successors, for and in respect of the several instruments, matters, and things described or mentioned in the said schedule, or for or in respect of the vellum, parchment, or paper upon which any of them respectively shall be written, the several duties or sums of money set down in figures against the same respectively, or otherwise specified and set forth, in the said schedule, which said schedule, and the several provisions, regulations, directions, and exemptions therein contained with respect Stamp duties on instruments in the schedule annexed repealed, and others granted in lieu.

× This act is now repealed except as to 8, 17, 19 & 20 by 33 & 34 Vict. c 99.

16 & 17 Vict. c. 59.

to the said duties, and the instruments, matters, and things charged therewith or exempted therefrom, shall be deemed and taken to be part of this act, and shall be applied, observed, and put into execution accordingly: provided always, that nothing herein contained shall extend to repeal or alter any of the said stamp duties now payable in relation to any deed or instrument which shall have been signed or executed by any party thereto or which shall bear date before or upon the tenth day of October, one thousand eight hundred and fifty-three.

The new duties to be denominated stamp duties, and to be under the care of the commissioners of inland revenue.

II. The said duties by this act granted shall be denominated and deemed to be stamp duties, and shall be under the care and management of the commissioners of inland revenue for the time being; and all the powers, provisions, clauses, regulations, directions, allowances, and exemptions, fines, forfeitures, pains, and penalties, contained in or imposed by any act or acts, or any schedule thereto, relating to any duties of the same kind or description heretofore payable in Great Britain and Ireland respectively, and in force at the time of the passing of this act, shall respectively be in full force and effect with respect to the duties by this act granted, and to the vellum, parchment, and paper, instruments, matters, and things, charged and chargeable therewith, and to the persons liable to the payment of the said duties, so far as the same are or shall be applicable, in all cases not hereby expressly provided for, and shall be observed, applied, allowed, enforced, and put in execution for and in the raising, levying, collecting, and securing of the said duties hereby granted, and otherwise in relation thereto, so far as the same shall not be superseded by and shall be consistent with the express provisions of this act, as fully and effectually to all intents and purposes as if the same had been herein repeated and specially enacted, mutatis mutandis, with reference to the said duties by this act granted.

Powers and provisions of former acts to be in force.

Stamps denoting the duty of one penny on receipts and drafts may be impressed or affixed.

III. The duties of one penny by this act granted on receipts and on drafts or orders for the payment of money respectively may be denoted either by a stamp impressed upon the paper whereon any such instrument is written, or by an adhesive stamp affixed thereto, and the commissioners of inland revenue shall provide stamps of both descriptions for the purpose of denoting the said duties.

Where adhesive stamps are used to denote the duties on receipts, drafts or orders, the stamps to be cancelled by writing the name on it.

IV. In any case where an adhesive stamp shall be used for the purpose aforesaid on any receipt or upon any draft or order respectively chargeable with the duty of one penny by this act, the person by whom such receipt shall be given or such draft or order signed or made shall, before the instrument shall be delivered out of his hands, custody, or power, cancel or obliterate the stamp so used, by writing thereon his or the initial letters of his name so and in such a manner as to show clearly and distinctly that such stamp has been made use of, and so that the same may not be again used: and if any person, who shall write or give any such receipt of discharge or make or sign any such draft or order with any adhesive stamp thereon, shall not bonâ fide in manner

aforesaid effectually cancel or obliterate such stamp, he shall forfeit the sum of ten pounds. 16 & 17 Vict. c. 59.

V. If any person shall fraudulently get off or remove, or cause or procure to be gotten off or removed, from any paper whereon any receipt or any draft or order shall be written, any adhesive stamp, or if any person shall affix or use any such stamp which shall have been gotten off or removed from any paper whereon any receipt or any draft or order shall have been written, to or for any receipt, draft, or order, or any paper whereon any such receipt, draft, or order shall be or be intended to be written, or if any person shall do or practise or be concerned in any fraudulent act, contrivance, or device whatever, not specially provided for by this or some other act of Parliament, with intent or design to defraud her Majesty, her heirs or successors, of any duty by this act granted upon receipts or upon drafts or orders, every person so offending in any of the said several cases shall forfeit the sum of twenty pounds. Penalty for committing frauds in the use of adhesive stamps.

XIX. Provided always, that any draft or order drawn upon a banker for a sum of money payable to order on demand which shall, when presented for payment, purport to be endorsed by the person to whom the same shall be drawn payable, shall be a sufficient authority to such banker to pay the amount of such draft or order to the bearer thereof; and it shall not be incumbent on such banker to prove that such endorsement, or any subsequent endorsement, was made by or under the direction or authority of the person to whom the said draft or order was or is made payable either by the drawer or any endorser thereof. Drafts on bankers payable to order on demand sufficient authority for payment without proof of endorsement.

The SCHEDULE referred to by this Act.	Duty. £	s.	d.
DRAFT or ORDER for the payment of any sum of money to the bearer or to order, on demand .	0	0	1

And the following instruments shall be deemed and taken to be drafts or orders for the payment of money within the intent and meaning of this act, and of any act or acts relating to the stamp duties on bills of exchange, drafts or orders, and shall be chargeable accordingly with the stamp duties imposed by this act or any such act or acts; viz.—

All documents or writings usually termed letters of credit, or whereby any person to whom any such document or writing is or is intended to be delivered or sent shall be entitled, or be intended to be entitled, to have credit with, or in account with, or to draw upon any other

16 & 47 Vict. c. 59.

	£	s.	d.
person for, or to receive from such other person, any sum of money therein mentioned.			

EXEMPTIONS from the DUTIES on DRAFTS or ORDERS.

All drafts or orders for the payment of money to the bearer on demand, drawn upon any banker or bankers, now by law exempt from stamp duty.

All letters of credit, whether in sets or not, sent by persons in the United Kingdom to persons abroad authorizing drafts on the United Kingdom.

POLICY of ASSURANCE or Insurance, or other instrument, by whatever name the same shall be called, whereby any insurance shall be made upon any life or lives, or upon any event or contingency relating to or depending upon any life or lives;			
Where the sum insured shall not exceed five hundred pounds;			
Then for every fifty pounds, and any fractional part of fifty pounds . . .	0	0	6
And where it shall exceed five hundred pounds, and shall not exceed one thousand pounds;			
Then for every one hundred pounds, and any fractional part of one hundred pounds	0	1	0
And where it shall exceed one thousand pounds;			
Then for every one thousand pounds, and any fractional part of one thousand pounds	0	10	0
RECEIPT or DISCHARGE given for or upon the payment of money amounting to two pounds or upwards	0	0	1

EXEMPTION.

Receipts given for money deposited in any bank, or in the hands of any banker to be accounted for, whether with interest or not; provided the same be not expressed to be received of or by the hands of any other than the person to whom the same is to be accounted for: Provided always, that this exemption shall not extend to receipts or acknowledgments for sums paid or deposited for or upon letters of allotment of shares or in respect of calls upon any scrip or shares of or in any joint stock or other company or proposed or intended company, which said last-mentioned receipts or acknowledgments, by whomsoever given, shall be liable to the duty by this act charged on receipts.

[17 & 18 Vict. c. 83.]

An Act to amend the Laws relating to the Stamp Duties.

[10th August, 1854.]

17 & 18 Vict. c. 83.

Whereas it is expedient to repeal the stamp duties now payable in respect of the several instruments, matters, and things mentioned or described in the schedule to this act annexed, and to impose other stamp duties in lieu thereof, and otherwise to amend the laws relating to stamp duties: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, as follows:

Stamp duties on instruments mentioned in schedule to this act, payable under other acts, repealed, and the duties named in said schedule granted in lieu thereof.

I. From and after the tenth day of October, one thousand eight hundred and fifty-four, the stamp duties now payable in Great Britain and Ireland respectively, under or by virtue of any act or acts of parliament for or in respect of the several instruments, matters, and things mentioned or described in the schedule to this act annexed, and whereon other duties are by this act granted, shall respectively cease and determine, and shall be and the same are hereby repealed; and in lieu thereof there shall be granted, charged, and paid in and throughout the United Kingdom of Great Britain and Ireland, unto and for the use of her Majesty, her heirs and successors, upon and in respect of the several instruments, matters, and things described or mentioned in the said schedule, or upon or in respect of the vellum, parchment, or paper upon which any of them respectively shall be written, the several duties or sums of money specified and set forth in the said schedule, which said schedule, and the several provisions, regulations, and directions therein contained, shall be deemed and taken to be part of this act, and shall be applied, observed, and put in execution accordingly: Provided always, that nothing herein contained shall extend to repeal or alter any of the said stamp duties now payable in relation to any bill of exchange, promissory note, or other instrument which shall have been drawn, made, or signed, or which shall bear date before or upon the said tenth day of October, one thousand eight hundred and fifty-four.

The new duties by this act granted to be denominated stamp duties, and to be under the care of commissioners of inland revenue.

II. The said duties by this act granted shall be denominated and deemed to be stamp duties, and shall be under the care and management of the commissioners of inland revenue for the time being; and all the powers, provisions, clauses, regulations, directions, allowances, and exemptions, fines, forfeitures, pains, and penalties contained in or imposed by any act or acts or any schedule thereto, relating to any duties of the same kind or description heretofore payable in Great Britain and Ireland respectively, and in force at the time of the passing of this act, shall respectively be in full force and effect with respect to the duties by this act granted, and to the vellum, parchment, and paper, instruments, matters, and things charged and chargeable therewith, and to the persons liable to the payment of the said duties, so far as the same are or shall be applicable, in all cases not hereby

Powers and provisions of former acts to be in force.

17 & 18 Vict. c. 83.

expressly provided for, and shall be observed, applied, allowed, enforced, and put in execution for and in the raising, levying, collecting, and securing of the said duties hereby granted, and otherwise in relation thereto, so far as the same shall not be superseded by and shall be consistent with the express provisions of this act, as fully and effectually to all intents and purposes as if the same had been herein repeated and specially enacted, mutatis mutandis, with reference to the said duties by this act granted.

Duties on bills drawn out of the United Kingdom to be denoted by adhesive stamps.

III. The duties by this act granted in respect of bills of exchange drawn out of the United Kingdom shall attach and be payable upon all such bills as shall be paid, indorsed, transferred, or otherwise negotiated within the United Kingdom wheresoever the same may be payable, and the said duties shall be denoted by adhesive stamps, to be provided by the commissioners of inland revenue for that purpose, and to be affixed to such bills as hereinafter directed.

Bills purporting to be drawn abroad deemed for the purposes of this act to be so drawn.

IV. Every bill of exchange which shall purport to be drawn at any place out of the United Kingdom shall for all the purposes of this act be deemed to be a foreign bill of exchange drawn out of the United Kingdom, and shall be chargeable with stamp duty accordingly, notwithstanding that in fact the same may have been drawn within the United Kingdom.

The holder of a bill drawn out of the United Kingdom to affix an adhesive stamp thereon before negotiating it.

V. The holder of any bill of exchange drawn out of the United Kingdom, and not having a proper adhesive stamp affixed thereon as herein directed, shall, before he shall present the same for payment, or indorse, transfer, or in any manner negotiate such bill, affix thereon a proper adhesive stamp for denoting the duty by this act charged on such bill; and the person who shall indorse, transfer, or negotiate such bill shall, before he shall deliver the same out of his hands, custody, or power, cancel the stamp so affixed by writing thereon his name or the name of his firm and the date of the day and year on which he shall so write the same, to the end that such stamp may not be again used for any other purpose; and if any person shall present for payment, or shall pay or indorse, transfer or negotiate any such bill as aforesaid whereon there shall not be such adhesive stamp as aforesaid duly affixed, or if any person who ought as directed by this act to cancel such stamp in manner aforesaid shall refuse or neglect so to do, such person so offending in any such case shall forfeit the sum of fifty pounds; and no person who shall take or receive from any other person any such bill as aforesaid, either in payment or as a security, or by purchase or otherwise, shall be entitled to recover thereon, or to make the same available for any purpose whatever, unless at the time when he shall so take or receive such bill there shall be such stamp as aforesaid affixed thereon and cancelled in the manner hereby directed.

Penalty for negotiating such bill without a stamp affixed or neglecting to cancel such stamp.

Penalty for drawing and issuing,

VI. If any person shall within the United Kingdom draw and issue any bill of exchange payable out of the United Kingdom

purporting to be drawn in a set, and shall not draw and issue on paper duly stamped as required by law the whole number of bills which such bill purports the set to consist of, or if any person shall within the United Kingdom transfer or negotiate any such bill of exchange as aforesaid purporting to be drawn in a set, and shall not at the same time transfer or deliver on paper duly stamped as aforesaid the whole number of bills which such bill purports the set to consist of, every such person so offending in any of such cases shall forfeit the sum of one hundred pounds; and if any person shall take or receive in the United Kingdom any such bill as aforesaid, either in payment or as a security or by purchase or otherwise, without having transferred or delivered to him duly stamped as aforesaid the whole number of bills which such bill purports the set to consist of, he shall not be entitled to recover on any such bill, or to make the same available for any purpose whatever.

or transferring or negotiating bills purporting to be a set, and not drawing the whole number of the set.

Penalty on taking or receiving such bills.

VII. And whereas, under and by virtue of certain acts relating to stamp duties, certain drafts or orders for the payment of any sum of money to the bearer on demand, drawn upon any banker or person acting as a banker residing or transacting the business of a banker, within fifteen miles of the place where such drafts or orders are issued, are exempted from all stamp duty, and it is expedient to prevent the negotiating or circulating of such drafts or orders unstamped at any place beyond the distance of fifteen miles from the place where the same are made payable: Be it enacted, that no such draft or order as aforesaid shall, unless the same be duly stamped as a draft or order, be remitted or sent to any place beyond the distance of fifteen miles in a direct line from the bank or place at which the same is made payable or be received in payment, or as a security, or be otherwise negotiated or circulated at any place beyond the said distance; and if any person shall remit or send any draft or order not duly stamped as aforesaid to any place beyond the distance aforesaid, or shall receive the same in payment, or as a security, or in any manner negotiate or circulate the same at any such last-mentioned place, he shall forfeit the sum of fifty pounds.

Unstamped drafts on bankers not to be circulated beyond fifteen miles of the place where made payable.

Penalty on persons offending.

VIII. Provided always, That it shall be lawful for any person who shall receive any such draft or order as aforesaid at any place within the said distance of fifteen miles from the bank or place at which the same is made payable, which draft or order shall have been lawfully issued unstamped, to affix thereto a proper adhesive stamp, and to cancel such stamp by writing thereon his name or the initial letters of his name, and thereupon such draft or order may lawfully be received and negotiated at any place beyond the distance aforesaid, anything herein contained notwithstanding.

Drafts lawfully issued unstamped may by fixing thereto an adhesive stamp be negotiated beyond the distance of fifteen miles.

IX. And whereas an act was passed in the seventeenth year of the reign of King George the Third, chapter thirty, for restraining the negotiation of promissory notes and inland bills of exchange

Provisions of 17 Geo. 3, c. 30, as extends to drafts on bankers repealed.

17 & 18 Vict. c. 83.

under a limited sum: Be it enacted, that the said act, and any act or acts continuing or perpetuating the same, shall, so far as they respectively extend or may be deemed or construed to extend to any draft on a banker for payment of money held for the use of the drawer, be and the same are hereby repealed.

Adhesive stamps denoting the duty of one penny may be used for receipts or drafts without regard to their special appropriation.

X. The adhesive stamps provided by the commissioners of inland revenue for denoting the duty of one penny payable on receipts and on drafts or orders for the payment of money to the bearer, or to order on demand respectively, may lawfully be used for the purpose of denoting the like amount of duty either on a receipt or on such draft or order as aforesaid, without regard to the special appropriation thereof for the other of such instruments by having its name on the face thereof, anything in any act or acts contained to the contrary notwithstanding.

What shall be deemed bank notes within the meanings of 7 & 8 Vict. c. 32, and 8 & 9 Vict. cc. 38 and 37.

XI. And whereas an act was passed in the seventh and eighth years of her Majesty's reign, chapter thirty-two, to regulate the issue of bank notes; and an act was passed in the eighth and ninth years of her Majesty's reign, chapter thirty-eight, to regulate the issue of bank notes in Scotland; and another act was passed in the last-mentioned years, chapter thirty-seven, to regulate the issue of bank notes in Ireland; and in order to prevent evasions of the regulations and provisions of the said respective acts it is expedient to define what shall be deemed to be bank notes within the meaning thereof respectively: Be it enacted, that all bills, drafts or notes (other than notes of the Bank of England) which shall be issued by any banker or the agent of any banker for the payment of money to the bearer on demand, and all bills, drafts or notes so issued, which shall entitle or be intended to entitle the bearer or holder thereof, without indorsement, or without any further or other indorsement than may be thereon at the time of the issuing thereof, to the payment of any sum of money on demand, whether the same shall be so expressed or not, in whatever form and by whomsoever such bills, drafts or notes shall be drawn or made, shall be deemed to be bank notes of the banker by whom or by whose agent the same shall be issued within the meaning of the said three several acts last mentioned, and within all the clauses, provisions and regulations thereof respectively.

All bills, drafts, and notes deemed bank notes under the above-recited acts liable to stamp duties, &c.

XII. All bills, drafts and notes, which by or under this act, or the said three several acts last mentioned, or any of them respectively, are declared or deemed to be bank notes, shall be subject and liable to the stamp duties, and composition for stamp duties, imposed by or payable under any act or acts in force upon or in respect of promissory notes for the payment of money to the bearer on demand; and all clauses, provisions, regulations, penalties and forfeitures contained in any act or acts relating to the issuing of such promissory notes, or for securing the said stamp duties and composition respectively, or for preventing or punishing frauds or evasions in relation thereto, shall respectively be deemed to apply to all such bills, drafts and notes as aforesaid, and to

the stamp duties and composition payable upon or in respect thereof, anything in this act, or any other act or acts, to the contrary notwithstanding. 17 & 18 Vict. c. 83.

XIII. And whereas under and by virtue of certain acts relating to stamp duties, letters by the general post acknowledging the safe arrival of any bills of exchange, promissory notes, or other securities for money are exempted from the stamp duty granted and imposed on receipts or discharges given for or upon the payment of money: Be it enacted, that the said exemption shall be and the same is hereby repealed. Exemption from receipt stamp duty of letters acknowledging receipt of bills, &c. repealed.

The SCHEDULE to which this Act refers.

	Duty.		
INLAND BILL OF EXCHANGE, Draft or Order, for the payment to the bearer, or to order, at any time otherwise than on demand, of any sum of money	£	*s.*	*d.*
Not exceeding £5	0	0	1
Exceeding £5 and not exceeding . 10	0	0	2
„ 10 „ . 25	0	0	3
„ 25 „ . 50	0	0	6
„ 50 „ . 75	0	0	9
„ 75 „ . 100	0	1	0
„ 100 „ . 200	0	2	0
„ 200 „ . 300	0	3	0
„ 300 „ . 400	0	4	0
„ 400 „ . 500	0	5	0
„ 500 „ . 750	0	7	6
„ 750 „ . 1,000	0	10	0
„ 1,000 „ . 1,500	0	15	0
„ 1,500 „ . 2,000	1	0	0
„ 2,000 „ . 3,000	1	10	0
„ 3,000 „ . 4,000	2	0	0
„ 4,000 and upwards . .	2	5	0
FOREIGN BILL OF EXCHANGE drawn in, but payable out of, the United Kingdom,			
If drawn singly or otherwise than in a set of three or more, the same duty as on an inland bill of the same amount and tenor.			
If drawn in sets of three or more, for every bill of each set,			
Where the sum payable thereby shall not exceed £25	0	0	1
And where it shall exceed £25 and not exceed 50	0	0	2
„ 50 „ . 75	0	0	3
„ 75 „ . 100	0	0	4
„ 100 „ . 200	0	0	8
„ 200 „ . 300	0	1	0
„ 300 „ . 400	0	1	4

17 & 18 Vict. c. 83.

					£	s.	d.
And where it shall exceed	£400	and not exceed		500	0	1	8
,,	500	,,	.	750	0	2	6
,,	750	,,	.	1,000	0	3	4
,,	1,000	,,	.	1,500	0	5	0
,,	1,500	,,	.	2,000	0	6	8
,,	2,000	,,	.	3,000	0	10	0
,,	3,000	,,	.	4,000	0	13	4
,,	4,000 and upwards		.	.	0	15	0

FOREIGN BILL OF EXCHANGE drawn out of the United Kingdom, and payable within the United Kingdom, the same duty as on an inland bill of the same amount and tenor.

FOREIGN BILL OF EXCHANGE drawn out of the United Kingdom, and payable out of the United Kingdom, but indorsed or negotiated within the United Kingdom, the same duty as on a foreign bill drawn within the United Kingdom, and payable out of the United Kingdom.

PROMISSORY NOTE for the payment in any other manner than to the bearer on demand of any sum of money,

Not exceeding	. . . . .			£5	0	0	1
Exceeding	£5	and not exceeding	.	10	0	0	2
,,	10	,,	.	25	0	0	3
,,	25	,,	.	50	0	0	6
,,	50	,,	.	75	0	0	9
,,	75	,,	.	100	0	1	0

PROMISSORY NOTE for the payment, either to the bearer on demand or in any other manner than to the bearer on demand, of any sum of money,

Exceeding	£100	and not exceeding	.	£200	0	2	0
,,	200	,,	.	300	0	3	0
,,	300	,,	.	400	0	4	0
,,	400	,,	.	500	0	5	0
,,	500	,,	.	750	0	7	6
,,	750	,,	.	1,000	0	10	0
,,	1,000	,,	.	1,500	0	15	0
,,	1,500	,,	.	2,000	1	0	0
,,	2,000	,,	.	3,000	1	10	0
,,	3,000	,,	.	4,000	2	0	0
,,	4,000 and upwards		.	.	2	5	0

[17 & 18 Vict. c. 90.]

An Act to repeal the Laws relating to Usury and to the Enrolment of Annuities. [10th August, 1854.]

17 & 18 Vict. c. 90.

Whereas it is expedient to repeal the laws at present in force relating to usury: Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, as follows:

Acts, &c. named in schedule repealed.

I. The several acts and parts of acts made in the parliaments of England and Scotland, Great Britain and Ireland, mentioned in the schedule hereto, and all existing laws against usury, shall be repealed.

Transactions previous to passing of this Act not to be affected.

II. Provided always, that nothing herein contained shall prejudice or affect the rights or remedies of any person, or diminish or alter the liabilities of any person, in respect of any act done previously to the passing of this act.

Legal or current rate of interest to mean the same as if this act had not passed.

III. Where interest is now payable upon any contract, express or implied, for payment of the legal or current rate of interest, or where upon any debt or sum of money interest is now payable by any rule of law, the same rate of interest shall be recoverable as if this act had not been passed.

Not to affect the law as to pawnbrokers.

IV. Provided always, that nothing herein contained shall extend or be construed to extend to repeal or affect any statute relating to pawnbrokers, but that all laws touching and concerning pawnbrokers shall remain in full force and effect, to all intents and purposes whatsoever, as if this act had not been passed.

[17 & 18 Vict. c. 125, s. 87.]

An Act for the further Amendment of the Process, Practice and Mode of Pleading in and enlarging the Jurisdiction of the Superior Courts of Common Law at Westminster, and of the Superior Courts of Common Law of the Counties Palatine of Lancaster and Durham. [12th August, 1854.]

17 & 18 Vict. c. 125, s. 87.

Actions on lost instruments.

LXXXVII. In case of any action founded upon a bill of exchange or other negotiable instrument, it shall be lawful for the court or a judge to order that the loss of such instrument shall not be set up, provided an indemnity is given, to the satisfaction of the court or judge, or a master, against the claims of any other person upon such negotiable instrument.

[18 & 19 Vict. c. 67.]

An Act to facilitate the Remedies on Bills of Exchange and Promissory Notes by the Prevention of frivolous or fictitious Defences to Actions thereon.

[23rd July, 1855.]

18 & 19 Vict. c. 67.

Whereas bonâ fide holders of dishonoured bills of exchange and promissory notes are often unjustly delayed and put to unnecessary expense in recovering the amount thereof by reason of frivolous or fictitious defences to actions thereon, and it is expedient that greater facilities than now exist should be given for the recovery of money due on such bills and notes: Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, as follows:

From Oct. 24, 1855, all actions upon bills of exchange, &c. may be by writ of summons as form in schedule A. Plaintiff, on filing affidavit of personal service, may at once sign final judgment as form in schedule B.

I. From and after the twenty-fourth day of October, one thousand eight hundred and fifty-five, all actions upon bills of exchange or promissory notes commenced within six months after the same shall have become due and payable, may be by writ of summons in the special form contained in schedule A. to this act annexed, and indorsed as therein mentioned; and it shall be lawful for the plaintiff, on filing an affidavit of personal service of such writ within the jurisdiction of the court, or an order for leave to proceed, as provided by the Common Law Procedure Act, 1852, and a copy of the writ of summons and the indorsements thereon, in case the defendant shall not have obtained leave to appear and have appeared to such writ according to the exigency thereof, at once to sign final judgment in the form contained in schedule B. to this act annexed (on which judgment no proceeding in error shall lie) for any sum not exceeding the sum indorsed on the writ together with interest, at the rate specified (if any), to the date of the judgment, and a sum for costs to be fixed by the masters of the superior courts or any three of them, subject to the approval of the judges thereof, or any eight of them (of whom the Lord Chief Justices and the Lord Chief Baron shall be three), unless the plaintiff claim more than such fixed sum, in which case the costs shall be taxed in the ordinary way, and the plaintiff may upon such judgment issue execution forthwith.

Defendant showing a defence upon the merits to have leave to appear.

II. A judge of any of the said courts shall, upon application within the period of twelve days from such service, give leave to appear to such writ, and to defend the action, on the defendant paying into court the sum indorsed on the writ, or upon affidavits satisfactory to the judge, which disclose a legal or equitable defence, or such facts as would make it incumbent on the holder to prove consideration, or such other facts as the judge may deem sufficient to support the application, and on such terms as to security or otherwise as to the judge may seem fit.

Judge may, under special circumstances, set aside judgment.

III. After judgment, the court or a judge may, under special circumstances, set aside the judgment, and, if necessary, stay or

set aside execution, and may give leave to appear to the writ and to defend the action, if it shall appear to be reasonable to the court or judge so to do, and on such terms as to the court or judge may seem just. 18 & 19 Vict. c. 67.

IV. In any proceedings under this act it shall be competent to the court or a judge to order the bill or note sought to be proceeded upon to be forthwith deposited with an officer of the court, and further to order that all proceedings shall be stayed until the plaintiff shall have given security for the costs thereof. Judge may order bill to be deposited with officer of court in certain cases.

V. The holder of every dishonoured bill of exchange or promissory note shall have the same remedies for the recovery of the expenses incurred in noting the same for non-acceptance or non-payment, or otherwise, by reason of such dishonour, as he has under this act for the recovery of the amount of such bill or note. Remedy for the recovery of expenses of noting non-acceptance of dishonoured bill.

VI. The holder of any bill of exchange or promissory note may, if he think fit, issue one writ of summons, according to this act, against all or any number of the parties to such bill or note, and such writ of summons shall be the commencement of an action or actions against the parties therein named respectively, and all subsequent proceedings against such respective parties shall be in like manner, so far as may be, as if separate writs of summons had been issued. Holder of a bill of exchange may issue one summons against all or any of the parties to the bill.

VII. The provisions of the Common Law Procedure Act, 1852, and the Common Law Procedure Act, 1854, and all rules made under or by virtue of either of the said acts, shall, so far as the same are or may be made applicable, extend and apply to all proceedings to be had or taken under this act. Common Law Procedure Acts and rules incorporated with this act.

VIII. The provisions of this act shall apply, as near as may be, to the Court of Common Pleas at Lancaster and the Court of Pleas at Durham, and the judges of such courts, being judges of one of the superior courts of common law at Westminster, shall have power to frame all rules and process necessary thereto. Act to apply to Courts of Common Pleas, Lancaster and Durham.

IX. It shall be lawful for her Majesty from time to time, by an order in council, to direct that all or any part of the provisions of this act shall apply to all or any court or courts of record in England and Wales, and within one month after such order shall have been made and published in the London Gazette such provisions shall extend and apply in manner directed by such order, and any such order may be, in like manner, from time to time altered and annulled; and in and by any such order her Majesty may direct by whom any powers or duties incident to the provisions applied under this act shall and may be exercised with respect to matters in such court or courts, and may make any orders or regulations which may be deemed requisite for carrying into operation in such court or courts the provisions so applied. Her Majesty may direct act to apply to Courts of record in England and Wales.

18 & 19 Vict. c. 67.

X. Nothing in this act shall extend to Ireland or Scotland.

Extent of act.

Short title.

XI. In citing this act in any instrument, document, or proceeding, it shall be sufficient to use the expression "The Summary Procedure on Bills of Exchange Act, 1855."

SCHEDULES referred to in the foregoing Act.

SCHEDULE (A.)

VICTORIA, by the grace of God, &c.

To *C. D.*, of , in the county of . We warn you, that unless within twelve days after the service of this writ on you, inclusive of the day of such service, you obtain leave from one of the judges of the courts at Westminster to appear, and do within that time appear in our court of in an action at the suit of *A. B.*, the said *A. B.* may proceed to judgment and execution.

Witness, &c.

Memorandum to be subscribed on the Writ.

N.B.—This writ is to be served within six calendar months from the date hereof, or, if renewed, from the date of such renewal, including the day of such date, and not afterwards.

Indorsement to be made on the Writ before Service thereof.

This writ was issued by *E. F.*, of , attorney for the plaintiff. *Or*, This writ was issued in person by *A. B.*, who resides at [*mention the city, town or parish, and also the name of the hamlet, street, and number of the house of the plaintiff's residence.*]

Indorsement.

The plaintiff claims [pounds principal and interest], *or* pounds balance of principal and interest due to him as the payee [*or* indorsee] of a bill of exchange or promissory note, of which the following is a copy:—

[*Here copy bill of exchange or promissory note, and all Indorsements upon it.*]

And if the amount thereof be paid to the plaintiff or his attorney within days from the service hereof, further proceedings will be stayed.

NOTICE.

Take notice, That if the defendant do not obtain leave from one of the judges of the courts within twelve days after having been served with this writ, inclusive of the day of such service, to appear thereto, and do within such time cause an appearance to be entered for him in the court out of which this writ issues, the plaintiff will be at liberty at any time after the expiration of such twelve days to sign final judgment for any sum not exceeding the

sum above claimed, and the sum of pounds for costs, and issue execution for the same. 18 & 19 Vict. c. 67.

Leave to appear may be obtained on an application at the Judges' Chambers, Serjeants' Inn, London, supported by affidavit showing that there is a defence to the action on the merits, or that it is reasonable that the defendant should be allowed to appear in the action.

Indorsement to be made on the Writ after Service thereof.

This writ was served by *X. Y.* on *L. M.* (the defendant the defendants), on *Monday*, the day of 18 .
By *X. Y.*

SCHEDULE (B.)

In the Queen's Bench.

On the day of in the year of our Lord 18 . [*Day of signing Judgment.*]

ENGLAND (to wit). *A. B.* in his own person [*or* by his attorney] sued out a writ against *C. D.*, indorsed as follows:—

[*Here copy Indorsement of Plaintiff's Claim.*]

and the said *C. D.* has not appeared:

Therefore it is considered that the said *A. B.* recover against the said *C. D.* pounds, together with pounds for costs of suit.

[19 & 20 Vict. c. 25.]

An Act to amend the Law relating to Drafts on Bankers. [23rd June, 1856.]

"Whereas doubts have arisen as to the obligations of bankers with respect to cross-written drafts: and whereas it would conduce to the ease of commerce, the security of property, and the prevention of crime, if drawers or holders of drafts on bankers payable to bearer or to order on demand were enabled effectually to direct the payment of the same to be made only to or through some banker:" Be it therefore enacted as follows: 19 & 20 Vict. c. 25.

I. In every case where a draft on any banker made payable to bearer or to order on demand bears across its face an addition, in written or stamped letters, of the name of any banker, or of the words "and company," in full or abbreviated, either of such additions shall have the force of a direction to the bankers upon whom such draft is made that the same is to be paid only to or through some banker, and the same shall be payable only to or through some banker. Draft crossed with banker's name, &c. to be payable only to or through some banker.

19 & 20 Vict. c. 25.

Construction.

II. In the construction of this act the word "banker" shall include any person or persons, or corporation, or joint stock or other company, acting as a banker or bankers.

[19 & 20 Vict. c. 97.]

An Act to amend the Laws of England and Ireland affecting Trade and Commerce. [29th July, 1856.]

19 & 20 Vict. c. 97.

Consideration for guarantee need not appear by writing.

III. No special promise to be made by any person after the passing of this act to answer for the debt, default, or miscarriage of another person, being in writing, and signed by the party to be charged therewith or some other person by him thereunto lawfully authorized shall be deemed invalid to support an action, suit, or other proceeding to charge the person by whom such promise shall have been made, by reason only that the consideration for such promise does not appear in writing, or by necessary inference from a written document.

Guarantee to or for a firm to cease upon a change in the firm, except in special cases.

IV. No promise to answer for the debt, default, or miscarriage of another made to a firm consisting of two or more persons, or to a single person trading under the name of a firm, and no promise to answer for the debt, default, or miscarriage of a firm consisting of two or more persons, or of a single person trading under the name of a firm, shall be binding on the person making such promise in respect of anything done or omitted to be done after a change shall have taken place in any one or more of the persons constituting the firm, or in the person trading under the name of a firm, unless the intention of the parties, that such promise shall continue to be binding notwithstanding such change, shall appear either by express stipulation or by necessary implication from the nature of the firm or otherwise.

A surety who discharges the liability to be entitled to assignment of all securities held by the creditor.

V. Every person who, being surety for the debt or duty of another, or being liable with another for any debt or duty, shall pay such debt or perform such duty, shall be entitled to have assigned to him, or to a trustee for him, every judgment, specialty, or other security which shall be held by the creditor in respect of such debt or duty, whether such judgment, specialty, or other security shall or shall not be deemed at law to have been satisfied by the payment of the debt or performance of the duty, and such person shall be entitled to stand in the place of the creditor, and to use all the remedies, and, if need be, and upon a proper indemnity, to use the name of the creditor, in any action or other proceeding, at law or in equity, in order to obtain from the principal debtor, or any co-surety, co-contractor, or co-debtor, as the case may be, indemnification for the advances made and loss sustained by the person who shall have so paid such debt or performed such duty, and such payment or performance so made by such surety shall not be pleadable in bar of any such action or other proceeding by him: Provided always, that no co-surety, co-contractor, or

co-debtor shall be entitled to recover from any other co-surety, co-contractor, or co-debtor, by the means aforesaid, more than the just proportion to which, as between those parties themselves, such last-mentioned person shall be justly liable. 19 & 20 Vict. c. 97.

VI. No acceptance of any bill of exchange, whether inland or foreign, made after the thirty first day of December, one thousand eight hundred and fifty-six, shall be sufficient to bind or charge any person, unless the same be in writing on such bill, or if there be more than one part of such bill, on one of the said parts, and signed by the acceptor or some person duly authorized by him. Acceptance of a bill inland or foreign to be in writing on it, and signed by the acceptor or his agent.

VII. Every bill of exchange or promissory note drawn or made in any part of the United Kingdom of Great Britain and Ireland, the islands of Man, Guernsey, Jersey, Alderney and Sark, and the islands adjacent to any of them, being part of the dominions of her Majesty, and made payable in or drawn upon any person resident in any part of the said United Kingdom or islands, shall be deemed to be an inland bill; but nothing herein contained shall alter or affect the stamp duty, if any, which, but for this enactment, would be payable in respect of any such bill or note. What are to be deemed "inland bills."

VIII. In relation to the rights and remedies of persons having claims for repairs done to, or supplies furnished to or for, ships, every port within the United Kingdom of Great Britain and Ireland, the islands of Man, Guernsey, Jersey, Alderney and Sark, and the islands adjacent to any of them, being part of the dominions of her Majesty, shall be deemed a home port. With reference to the repairs of ships, every port within the United Kingdom, &c., a home port.

IX. All actions of account or for not accounting, and suits for such accounts, as concern the trade of merchandise between merchant and merchant, their factors or servants, shall be commenced and sued within six years after the cause of such actions or suits, or when such cause has already arisen, then within six years after the passing of this act; and no claim in respect of a matter which arose more than six years before the commencement of such action or suit shall be enforceable by action or suit by reason only of some other matter of claim comprised in the same account having arisen within six years next before the commencement of such action or suit. Limitation of actions for "merchants' accounts.

X. No person or persons who shall be entitled to any action or suit with respect to which the period of limitation within which the same shall be brought is fixed by the act of the twenty-first year of the reign of King James the First, chapter sixteen, section three, or by the act of the fourth year of the reign of Queen Anne, chapter sixteen, section seventeen, or by the act of the fifty-third year of the reign of King George the Third, chapter one hundred and twenty-seven, section five, or by the acts of the third and fourth years of the reign of King William the Fourth, chapter twenty-seven, sections forty, forty-one, and forty-two, and chapter forty-two, section three, or by the act of the sixteenth and seventeenth years of the reign of her present Majesty, chapter one Absence beyond seas or imprisonment of a creditor not to be a disability.

19 & 20 Vict. c. 97.

hundred and thirteen, section twenty, shall be entitled to any time within which to commence and sue such action or suit beyond the period so fixed for the same by the enactments aforesaid, by reason only of such person, or some one or more of such persons, being at the time of such cause of action or suit accrued beyond the seas, or in the cases in which, by virtue of any of the aforesaid enactments, imprisonment is now a disability, by reason of such person or some one or more of such persons being imprisoned at the time of such cause of action or suit accrued.

Period of limitation to run as to joint debtors in the kingdom, though some are beyond seas.

XI. Where such cause of action or suit with respect to which the period of limitation is fixed by the enactments aforesaid or any of them lies against two or more joint debtors, the person or persons who shall be entitled to the same shall not be entitled to any time within which to commence and sue any such action or suit against any one or more of such joint debtors who shall not be beyond the seas at the time such cause of action or suit accrued, by reason only that some other one or more of such joint debtors was or were at the time such cause of action accrued beyond the seas, and such person or persons so entitled as aforesaid shall not be barred from commencing and suing any action or suit against the joint debtor or joint debtors who was or were beyond seas at the time the cause of action or suit accrued after his or their return from beyond seas, by reason only that judgment was already recovered against any one or more of such joint debtors who was not or were not beyond seas at the time aforesaid.

Judgment recovered against joint debtors in the kingdom to be no bar to proceedings against others beyond seas after their return.

Definition of "beyond seas," within 4 & 5 Anne, c. 36, and this act.

XII. No part of the United Kingdom of Great Britain and Ireland, nor the islands of Man, Guernsey, Jersey, Alderney and Sark, nor any islands adjacent to any of them, being part of the dominions of her Majesty, shall be deemed to be beyond seas within the meaning of the act of the fourth and fifth years of the reign of Queen Anne, chapter sixteen, or of this act.

Provisions of 9 Geo. 4, c. 14, ss. 1 & 8, and 16 & 17 Vict. c. 113, ss. 24 & 27, extended to acknowledgments by agents.

XIII. In reference to the provisions of the acts of the ninth year of the reign of King George the Fourth, chapter fourteen, sections one and eight, and the sixteenth and seventeenth years of the reign of her present Majesty, chapter one hundred and thirteen, sections twenty-four and twenty-seven, an acknowledgment or promise made or contained by or in a writing signed by an agent of the party chargeable thereby, duly authorized to make such acknowledgment or promise, shall have the same effect as if such writing had been signed by such party himself.

Part payment by one contractor, &c. not to prevent bar by certain statutes of limitations in favour of another contractor, &c.

XIV. In reference to the provisions of the acts of the twenty-first year of the reign of King James the First, chapter sixteen, section three, and of the act of the third and fourth years of the reign of King William the Fourth, chapter forty-two, section three, and of the act of the sixteenth and seventeenth years of the reign of her present Majesty, chapter one hundred and thirteen, section twenty, when there shall be two or more co-contractors or co-debtors, whether bound or liable jointly only or jointly and

severally, or executors or administrators of any contractor, no such co-contractor or co-debtor, executor, or administrator shall lose the benefit of the said enactments or any of them, so as to be chargeable in respect or by reason only of payment of any principal, interest, or other money, by any other or others of such co-contractors or co-debtors, executors, or administrators.

19 & 20 Vict. c. 97.

[21 Vict. c. 20.]

An Act for granting a Stamp Duty on certain Drafts or Orders for the Payment of Money. [21st May, 1858].

21 Vict. c. 20.

I. From and after the twenty-fourth day of May, one thousand eight hundred and fifty-eight, all drafts or orders for the payment of any sum of money to the bearer on demand, which being drawn upon any banker, or any person or persons acting as a banker, and residing or transacting the business of a banker within fifteen miles of the place where such drafts or orders are issued, are now exempt from stamp duty, shall be chargeable with the stamp duty of one penny for every such draft or order.

After 24th May, 1858, certain drafts to be chargeable with a stamp duty of 1*d.*

[21 & 22 Vict. c. 79.]

An Act to amend the Law relating to Checks or Drafts on Bankers. [2nd August, 1858.]

21 & 22 Vict. c. 79.

Whereas it is expedient to amend the law relating to checks or drafts on bankers: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, as follows:

I. Whenever a check or draft on any banker payable to bearer or to order on demand shall be issued, crossed with the name of a banker or with two transverse lines with the words "and company" or any abbreviation thereof, such crossing shall be deemed a material part of the check or draft, and, except as hereafter mentioned, shall not be obliterated or added to or altered by any person whomsoever after the issuing thereof; and the banker upon whom such check or draft shall be drawn shall not pay such check or draft to any other than the banker with whose name such check or draft shall be so crossed, or if the same be crossed as aforesaid without a banker's name to any other than a banker.

The crossing to be deemed a material part of a check or draft, &c.

II. Whenever any such check or draft shall have been issued uncrossed, or shall be crossed with the words "and company" or any abbreviation thereof, and without the name of any banker, any lawful holder of such check or draft, while the same remains

The lawful holder of a check uncrossed, or crossed "and company," may cross the

21 & 22 Vict. c. 79.

same with the name of a banker.

so uncrossed, or crossed with the words "and company" or any abbreviation thereof without the name of any banker, may cross the same with the name of a banker; and whenever any such check or draft shall be uncrossed, any such lawful holder may cross the same with the words "and company" or any abbreviation thereof, with or without the name of a banker; and any such crossing as in this section mentioned shall be deemed a material part of the check or draft, and shall not be obliterated or added to or altered by any person whomsoever after the making thereof; and the banker upon whom such check or draft shall be drawn shall not pay such check or draft to any other than the banker with whose name such check or draft shall be so crossed as last aforesaid.

Persons obliterating, &c. crossing with intent to defraud, guilty of felony.

III. If any person shall obliterate, add to, or alter any such crossing with intent to defraud, or offer, utter, dispose of or put off with intent to defraud any check or draft on a banker, whereon such fraudulent obliteration, addition or alteration has been made, knowing it to have been so made, such person shall be guilty of felony, and being convicted thereof shall be liable at the discretion of the court to be transported beyond the seas for life, or to such other punishment as is enacted and provided for those guilty of forgery of bills of exchange in the statute in that case made and provided.

Banker not to be responsible for paying a check which does not plainly appear to have been crossed or altered.

IV. Provided always, that any banker paying a check or draft which does not at the time when it is presented for payment plainly appear to be or to have been crossed as aforesaid, or to have been obliterated, added to or altered as aforesaid, shall not be in any way responsible or incur any liability, nor shall such payment be questioned by reason of such check having been so crossed as aforesaid, or having been so obliterated, added to or altered as aforesaid, and of his having paid the same to a person other than a banker, or other than the banker with whose name such check or draft shall have been so crossed, unless such banker shall have acted *malâ fide*, or been guilty of negligence in so paying such check.

Interpretation of the word "banker."

V. In the construction of this act the word "banker" shall include any person or persons, or corporation, or joint stock company acting as a banker or bankers.

[23 & 24 Vict. c. 111.]

An Act for granting to Her Majesty certain Duties of Stamps, and to amend the Laws relating to the Stamp Duties. [28th August, 1860.]

23 & 24 Vict. c. 111.

The duties on foreign promis-

V. The duties by this act granted on promissory notes made or purporting to be made out of the United Kingdom shall be denoted by adhesive stamps, to be provided by the commissioners of inland revenue for the purpose, or by any stamps of sufficient

amount which shall have been provided for denoting the duties on bills of exchange made out of the United Kingdom; and the proper adhesive stamp for denoting the duty on any such note shall be affixed thereon, and be cancelled at the same time and times, and in like manner, as is provided by the fifth section of an act passed in the seventeenth and eighteenth years of her present Majesty, chapter eighty-three, and the twelfth section of an act passed in the present session, chapter fifteen, in the case of bills of exchange therein respectively mentioned, and under the like penalties respectively for any neglect thereof; and the said respective sections shall be read as if the same were inserted in this act expressly in reference to the promissory notes aforesaid, and the duties by this act granted thereon, as well as to the bills of exchange therein respectively mentioned.

23 & 24 Vict. c. 111,

sory notes to be denoted by adhesive stamps.

XVII. No draft, or order, writing or document for the payment or for entitling any person to the payment by or through any banker or person acting as a banker of any sum of money, such draft, order, writing or document being sent or delivered by the person making or giving the same to the banker or person acting as a banker by or through whom the payment is to be made, and not to the person to whom such payment is to be made or to any person on his behalf, shall be chargeable or be deemed to have been chargeable with any higher stamp duty than one penny, notwithstanding the said payment shall be or have been thereby directed to be made at any time after the date thereof, which duty of one penny may be denoted by an adhesive stamp, to be cancelled as in the case of a draft or order on demand.

Certain orders on bankers not to be subject to more than a penny stamp.

XVIII. Where any draft or order for the payment of money by any banker or person acting as a banker, chargeable with the stamp duty of one penny, shall come to the hands of such person unstamped, it shall be lawful for him to affix thereto the necessary adhesive stamp, and to cancel the same in manner by law required, and upon so doing to make the payment thereby directed, and to charge the duty in account against the person who ought to have paid the same, or to deduct such duty from the sum so directed to be paid; and such draft or order shall, so far as relates to the stamp duty chargeable thereon, be good and valid; but this shall not relieve any person from the liability to the penalty he may have incurred by issuing the said draft or order unstamped.

Bankers may affix stamps to drafts or orders drawn on them.

XIX. Whereas by the eighteenth section of the act passed in the fifty-fifth year of the reign of King George the Third, chapter one hundred and eighty-four, the issuing of promissory notes payable to bearer on demand with printed dates therein is prohibited, and such prohibition is an unnecessary restriction: Be it enacted, that the said section of the said last-mentioned act shall be and is hereby repealed: Provided always, that, notwithstanding anything in any act of parliament contained to the contrary, it shall be lawful for any person to draw upon his banker, who shall bonâ fide hold money to or for his use, any draft or order for the payment, to the bearer or to order on demand, of any sum of money less than twenty shillings.

Sect. 18 of 55 Geo. 3, c. 184, prohibiting the issuing of bankers' notes with printed dates, repealed.

Draft on bankers for less than 20*s.* to be lawful.

[26 & 27 Vict. c. 105.]

An Act to remove certain Restrictions on the Negotiation of Promissory Notes and Bills of Exchange under a limited Sum. [28th July, 1863.]

26 & 27 Vict. c. 105.

17 Geo. 3, c. 30, &c., restraining negotiation in England of notes and bills for a limited sum, and sect. 17 and schedules (C.) and (D.) of 8 & 9 Vict. c. 38, restraining negotiation in Scotland of like notes, &c. repealed.

1. From and after the passing of this act, the act passed in the seventeenth year of the reign of King George the Third, chapter thirty, and so much and such part and parts of any other act or acts as continue or revive the said act, or as prohibit or restrain or impose any penalty for or on account of the publishing, uttering or negotiating in England of any promissory or other note, not being a note payable to bearer on demand, bill of exchange, draft or undertaking in writing, being negotiable or transferable, for the payment of twenty shillings or above that sum and less than five pounds, or on which twenty shillings, or above that sum and less than five pounds, shall remain undischarged, made, drawn or indorsed in any other manner than as directed by the said act of the seventeenth year aforesaid, and also the seventeenth section and schedules (C.) and (D.) of an act passed in the eighth and ninth years of her Majesty's reign, chapter thirty-eight, requiring or directing that all such notes, bills, drafts or undertakings as aforesaid which shall be issued in Scotland shall be made, drawn, or indorsed according to the forms contained in the said schedules respectively, shall be and the same is and are hereby repealed.

Term of act.

2. This act shall continue in force for three years, and until the end of the then next ensuing session of parliament.

[*Now continued by* 32 & 33 *Vict. c.* 85, *till* 28*th of July*, 1870, *and then next Session of Parliament.*]

[28 & 29 Vict. c. 86.]

An Act to amend the Law of Partnership.

[5th July, 1865.]

28 & 29 Vict. c. 86.

Whereas it is expedient to amend the law relating to partnership: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, as follows:

The advance of money on contract to receive a share of profits not to constitute the lender a partner.

1. The advance of money by way of loan to a person engaged or about to engage in any trade or undertaking upon a contract in writing with such person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on such trade or undertaking, shall not, of itself, constitute the lender a partner with the person or the persons carrying on such trade or undertaking, or render him responsible as such.

28 & 29 Vict. c. 86.

The remuneration of agents, &c. by share of profits not to make them partners.

2. No contract for the remuneration of a servant or agent of any person engaged in any trade or undertaking by a share of the profits of such trade or undertaking shall, of itself, render such servant or agent responsible as a partner therein nor give him the rights of a partner.

Certain annuitants not to be deemed partners.

3. No person being the widow or child of the deceased partner of a trader, and receiving by way of annuity a portion of the profits made by such trader in his business, shall by reason only of such receipt, be deemed to be a partner of or to be subject to any liabilities incurred by such trader.

Receipt of profits in consideration of sale of goodwill not to make the seller a partner.

4. No person receiving by way of annuity or otherwise a portion of the profits of any business, in consideration of the sale by him of the goodwill of such business, shall, by reason only of such receipt, be deemed to be a partner of or be subject to the liabilities of the person carrying on such business.

In case of bankruptcy, &c. lender not to rank with other creditors.

5. In the event of any such trader as aforesaid being adjudged a bankrupt, or taking the benefit of any act for the relief of insolvent debtors, or entering into an arrangement to pay his creditors less than twenty shillings in the pound, or dying in insolvent circumstances, the lender of any such loan as aforesaid shall not be entitled to recover any portion of his principal, or of the profits or interest payable in respect of such loan, nor shall any such vendor of a goodwill as aforesaid be entitled to recover any such profits as aforesaid, until the claims of the other creditors of the said trader for valuable consideration in money or money's worth have been satisfied.

Interpretation of "person."

6. In the construction of this act the word "person" shall include a partnership firm, a joint stock company, and a corporation.

[32 & 33 Vict. c. 71.]

An Act to consolidate and amend the Law of Bankruptcy.

[9th August, 1869.]

32 & 33 Vict. c. 71.

Short title.

1. This act may be cited as "The Bankruptcy Act, 1869."

Application of act.

2. This act shall not, except in so far as is expressly provided, apply to Scotland or Ireland.

Commencement of act.

3. This Act shall not come into operation until the first day of January, one thousand eight hundred and seventy, which date is hereinafter referred to as the commencement of this act.

Interpretation of certain terms in the act:

4. In this act, if not inconsistent with the context, the following terms have the meanings hereinafter respectively assigned to them; that is to say,

"Court:"

"The Court" shall mean the court having jurisdiction in bankruptcy as by this act provided:

32 & 33 Vict. c. 71.

"Registrar:" "The registrar" shall mean the registrar of "the Court" as above defined:

"Prescribed:" "Prescribed" shall mean prescribed by rules of court to be made as in this act provided:

"Property:" "Property" shall mean and include money, goods, things in action, land, and every description of property, whether real or personal; also, obligations, easements, and every description of estate, interest, and profit, present or future, vested or contingent, arising out of or incident to property as above defined:

"Debt:" "Debt provable in bankruptcy" shall include any debt or liability by this act made provable in bankruptcy:

"Person:" "Person" shall include a body corporate:

"Trader:" "Trader" shall, for the purposes of this act, mean the several persons in that behalf mentioned in the first schedule to this act annexed.

Exclusion of companies and large partnerships.

5. A partnership, association, or company corporate, or registered under "The Companies act, 1862," shall not be adjudged bankrupt under this act.

Petition for adjudication in bankruptcy.

6. A single creditor, or two or more creditors if the debt due to such single creditor, or the aggregate amount of debts due to such several creditors, from any debtor, amount to a sum of not less than fifty pounds, may present a petition to the court, praying that the debtor be adjudged a bankrupt, and alleging as the ground for such adjudication any one or more of the following acts or defaults, hereinafter deemed to be and included under the expression "acts of bankruptcy":

(1.) That the debtor has, in England or elsewhere, made a conveyance or assignment of his property to a trustee or trustees for the benefit of his creditors generally:

(2.) That the debtor has, in England or elsewhere, made a fraudulent conveyance, gift, delivery, or transfer of his property, or of any part thereof:

(3.) That the debtor has, with intent to defeat or delay his creditors, done any of the following things, namely, departed out of England, or being out of England remained out of England, or being a trader departed from his dwelling-house, or otherwise absented himself, or begun to keep house, or suffered himself to be outlawed:

(4.) That the debtor has filed in the prescribed manner in the court a declaration admitting his inability to pay his debts:

(5.) That execution issued against the debtor on any legal process for the purpose of obtaining payment of not less than fifty pounds has in the case of a trader been levied by seizure and sale of his goods:

(6.) That the creditor presenting the petition has served in the prescribed manner on the debtor a debtor's summons requiring the debtor to pay a sum due, of an amount of not less than fifty pounds, and the debtor being a trader has for the space of seven days, or not being a trader has

for the space of three weeks, succeeding the service of such summons, neglected to pay such sum, or to secure or compound for the same. 32 & 33 Vict. c. 71.

But no person shall be adjudged a bankrupt on any of the above grounds unless the act of bankruptcy on which the adjudication is grounded has occurred within six months before the presentation of the petition for adjudication; moreover, the debt of the petitioning creditor must be a liquidated sum due at law or in equity, and must not be a secured debt, unless the petitioner state in his petition that he will be ready to give up such security for the benefit of the creditors in the event of the debtor being adjudicated a bankrupt, or unless the petitioner is willing to give an estimate of the value of his security, in which latter case he may be admitted as a petitioning creditor to the extent of the balance of the debt due to him after deducting the value so estimated, but he shall, on an application being made by the trustee within the prescribed time after the date of adjudication, give up his security to such trustee for the benefit of the creditors upon payment of such estimated value.

Definition of commencement of bankruptcy.

11. The bankruptcy of a debtor shall be deemed to have relation back to and to commence at the time of the act of bankruptcy being completed on which the order is made adjudging him to be bankrupt; or if the bankrupt is proved to have committed more acts of bankruptcy than one, to have relation back to and to commence at the time of the first of the acts of bankruptcy that may be proved to have been committed by the bankrupt within twelve months next preceding the order of adjudication; but the bankruptcy shall not relate to any prior act of bankruptcy, unless it be that at the time of committing such prior act the bankrupt was indebted to some creditor or creditors in a sum or sums sufficient to support a petition in bankruptcy, and unless such debt or debts are still remaining due at the time of the adjudication.

Descriptions of bankrupt's property divisible amongst creditors.

15. The property of the bankrupt divisible amongst his creditors, and in this act referred to as the property of the bankrupt, shall not comprise the following particulars:

(1.) Property held by the bankrupt on trust for any other person:

(2.) The tools (if any) of his trade, and the necessary wearing apparel and bedding of himself, his wife and children, to a value, inclusive of tools and apparel and bedding, not exceeding twenty pounds in the whole.

But it shall comprise the following particulars:

(3.) All such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve on him during its continuance:

(4.) The capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of property as might have been exercised by the bankrupt for his own benefit at the commencement of his bankruptcy or during its continuance, except the right of nomination to a vacant ecclesiastical benefice:

32 & 33 Vict. c. 71.

(5.) All goods and chattels being, at the commencement of the bankruptcy, in the possession, order or disposition, of the bankrupt, being a trader, by the consent and permission of the true owner, of which goods and chattels the bankrupt is reputed owner, or of which he has taken upon himself the sale or disposition as owner; provided that things in action, other than debts due to him in the course of his trade or business, shall not be deemed goods and chattels within the meaning of this clause.

Description of debts provable in bankruptcy.

31. Demands in the nature of unliquidated damages arising otherwise than by reason of a contract or promise shall not be provable in bankruptcy, and no person having notice of any act of bankruptcy available for adjudication against the bankrupt shall prove for any debt or liability contracted by the bankrupt subsequently to the date of his so having notice.

Save as aforesaid, all debts and liabilities, present or future, certain or contingent, to which the bankrupt is subject, at the date of the order of adjudication, or to which he may become subject during the continuance of the bankruptcy by reason of any obligation incurred previously to the date of the order of adjudication, shall be deemed to be debts provable in bankruptcy, and may be proved in the prescribed manner before the trustee in the bankruptcy.

Interest on debts.

36. Interest on any debt provable in bankruptcy may be allowed by the trustee under the same circumstances in which interest would have been allowable by a jury if an action had been brought for such debt.

Proof in respect of distinct contracts.

37. If any bankrupt is at the date of the order of adjudication liable in respect of distinct contracts as member of two or more distinct firms, or as a sole contractor, and also as member of a firm, the circumstance that such firms are in whole or in part composed of the same individuals, or that the sole contractor is also one of the joint contractors, shall not prevent proof in respect of such contracts, against the properties respectively liable upon such contracts.

Set-off.

39. Where there have been mutual credits, mutual debts, or other mutual dealings between the bankrupt and any other person proving or claiming to prove a debt under his bankruptcy, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set off against any sum due from the other party, and the balance of such account, and no more, shall be claimed or paid on either side respectively; but a person shall not be entitled under this section to claim the benefit of any set-off against the property of a bankrupt in any case where he had at the time of giving credit to the bankrupt notice of an act of bankruptcy committed by such bankrupt and available against him for adjudication.

32 & 33 Vict. c. 71.

Effect of order of discharge.

49. An order of discharge shall not release the bankrupt from any debt or liability incurred by means of any fraud or breach of trust, nor from any debt or liability whereof he has obtained forbearance by any fraud, but it shall release the bankrupt from all other debts provable under the bankruptcy, with the exception of—

(1.) Debts due to the Crown:

(2.) Debts with which the bankrupt stands charged at the suit of the Crown or of any person for any offence against a statute relating to any branch of the public revenue, or at the suit of the sheriff or other public officer on a bail bond entered into for the appearance of any person prosecuted for any such offence:

And he shall not be discharged from such excepted debts unless the commissioners of the treasury certify in writing their consent to his being discharged therefrom.

An order of discharge shall be sufficient evidence of the bankruptcy, and of the validity of the proceedings thereon, and in any proceedings that may be instituted against a bankrupt who has obtained an order of discharge in respect of any debt from which he is released by such order, the bankrupt may plead that the cause of action occurred before his discharge, and may give this act and the special matter in evidence.

Exception of joint debtors.

50. The order of discharge shall not release any person who, at the date of the order of adjudication, was a partner with the bankrupt, or was jointly bound or had made any joint contract with him.

Avoidance of fraudulent preferences.

92. Every conveyance or transfer of property, or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own monies, in favour of any creditor, or any person in trust for any creditor, with a view of giving such creditor a preference over the other creditors, shall, if the person making, taking, paying, or suffering the same become bankrupt within three months after the date of making, taking, paying, or suffering the same, be deemed fraudulent and void as against the trustee of the bankrupt appointed under this act; but this section shall not affect the rights of a purchaser, payee, or incumbrancer in good faith and for valuable consideration.

Protection of certain transactions with bankrupt.

94. Nothing in this act contained shall render invalid,—

(1.) Any payment made in good faith and for value received to any bankrupt before the date of the order of adjudication by a person not having at the time of such payment notice of any act of bankruptcy committed by the bankrupt, and available against him for adjudication:

(2.) Any payment or delivery of money or goods belonging to a bankrupt, made to such bankrupt by a depository of such money or goods before the date of the order of adjudication, who had not at the time of such payment or delivery notice of any act of bankruptcy committed by the bankrupt, and available against him for adjudication:

32 & 33 Vict. c. 71.

(3.) Any contract or dealing with any bankrupt, made in good faith and for valuable consideration, before the date of the order of adjudication, by a person not having, at the time of making such contract or dealing, notice of any act of bankruptcy committed by the bankrupt, and available against him for adjudication.

Power to present petition against one partner.

100. Any creditor whose debt is sufficient to entitle him to present a bankruptcy petition against all the partners of a firm may present such petition against any one or more partners of such firm without including the others.

Evidence of proceedings in bankruptcy.

107. Any petition or copy of a petition in bankruptcy, any order or copy of an order made by any court having jurisdiction in bankruptcy, any certificate or copy of a certificate made by any court having jurisdiction in bankruptcy, any deed or copy of a deed of arrangement in bankruptcy, and any other instrument or copy of an instrument, affidavit, or document made or used in the course of any bankruptcy proceedings, or other proceedings had under this act, may, if any such instrument as aforesaid or copy of an instrument appears to be sealed with the seal of any court having jurisdiction, or purports to be signed by any judge having jurisdiction in bankruptcy under this act, be receivable in evidence in all legal proceedings whatever.

Saving as to joint contracts.

112. Where a bankrupt is a contractor in respect of any contract jointly with any other person or persons, such person or persons may sue or be sued in respect of such contract, without the joinder of the bankrupt.

Saving as to debts contracted prior to August, 1861.

118. No person, not being a trader, shall be adjudged a bankrupt in respect of a debt contracted before the date of the passing of the Bankruptcy Act, 1861.

INDEX.

[Should the Index be found defective in any part, the reader is referred to the full Analytical Table of Contents prefixed.]

A.

ABODE,
of payee of bills under *5l.*, 83.
formerly must in some cases have been stated, 83.

ACCEPTANCE,
what it is, 1, 184.
what it admits, 199, 465.
effects of, 3.
by partners, 41, 45, 46, 47.
cross acceptances, 125, 448—454.
by one of several, not partners, 186.
liability of drawee before acceptance, 184.
cannot be two several acceptances of the same bill, 186, 195.
before bill filled up, 187.
oral, not before bill in existence, 188.
after bill is due, 189.
after previous refusal to accept, 189.
of inland bills, must be in writing on the bill, 189.
what will be such acceptance, 189.
is irrevocable, 191.
of foreign bills, 190, 191, 394.
promise to pay, 190.
to whom it may be made, 190.
promise to accept, 190.
detention of the bill, 191.
destruction of it, 191.
what engagement the holder may require of acceptor, 192.
proper conduct for holder to pursue in case of qualified acceptance, 192.
condition may be contained in a collateral contemporaneous writing, 98, 193.
but a verbal contemporaneous condition not admissible, 99, 193.
nor a written one against innocent indorsee, 193.
condition must be set out in pleading, though performed, 194.
partial or varying acceptance, what, 194.
payable at a particular place, 194.
acceptance inchoate and revocable till delivery, 195.
liability of acceptor, 196.

ACCEPTANCE—*continued.*
how discharged, 196.
by waiver, 196.
by express renunciation, 197.
by cancellation, 195, 196.
by taking other security, 198.
in case of joint acceptors, by taking security from one, 198.
pleading, 199.
presentment for acceptance, 180—183.
release of acceptor, 237, 246.
release by or to one of several, 238.
how far covenant not to sue will operate as release, 238, 246.
agreement not to sue, 247.
effect of release may be restrained by the terms of the instrument, 238, 246.
admits drawer's handwriting, 199.
and authority of agent to draw, 33, 200.
where drawee cannot dispute his acceptance, 200.
by agent. See *Agent.*
by executor. See *Executor.*
by partner. See *Partner.*
by infant. See *Infant.*
by married women. See *Married Woman.*
by corporation. See *Corporation.*

ACCEPTANCE SUPRA PROTEST,
mode of accepting *supra protest*, 261.
who may so accept, 262.
whether there may be several acceptors *supra protest*, 262.
conduct for holder to pursue who takes an acceptance *supra protest*, 262.
presentment for payment to the drawee still necessary, 262.
liability of acceptor *supra protest*, 263.
against what parties acceptor *supra protest* acquires a right of action, 265.

ACCOMMODATION BILL,
what it is, 129.
what it is in common language, 404.
what it is in strictness, 404.
when an accommodation acceptor can recover costs of an action brought against him, 404.
when a defence that a bill was drawn for accommodation, 121, 129.
who is principal on, 243.
drawer of, not entitled to notice of dishonour, 292, 293.
drawer discharged by indulgence to the acceptor, 243.
payment *supra protest*, 267.
proof of, in bankruptcy, 448, 454.
in the hands of an indorsee for value, 454.
may be indorsed by bankrupt after bankruptcy, 464.
operation of Statute of Limitations as to, 342.

ACCOUNT,
direction to place to, 88.
mutual, when not barred by the Statute of Limitations, 348.

ACCOUNT STATED,
when a bill or note evidence under, 435.
within Statute of Limitations, 348.

ACTION ON A BILL OR NOTE,
who may bring, 2, 402.
suing in the name of another, 2, note (*c*), 403.
judgment against two parties, 403.
joining counts, 57, 403, 414.
of *assumpsit*, 418.
when a corporation can sue or be sued in *assumpsit*, 68.
action of *debt*, 417.
between what parties an action of *debt* will lie, 417.
proceedings for costs, 404.
when the old action of *debt* could be brought on a note payable by instalments, 417.
once doubtful whether it would lie where no consideration appears on the face of the instrument, 417, note (*i*).
against what parties actions may be brought, 403.
party liable in two capacities, 403.
how far extinguishment of the right of action as to one party will be a defence to others, 403.
proceedings in an action for costs, 404,
affidavit to hold to bail, 405.
character of defendant, 406.
of plaintiff, 407.
description of defendant by initials, 407.
statement of consideration, 407.
trover or detinue for a bill, 404.
who may sue in trover, 405.
amount of verdict, 405.
effect of judgment in an action of trover in changing the property in a bill, 405.
relief in equity, 405, 414.
statement of indorsements, 405.
venue, 410.
when the Court will change it, 410.
inspection of bill, 335, 410.
particulars of demand, 410.
staying proceedings, in what cases, and on what terms, 411.
setting aside plea, 412.
interest, 302, 412.
re-exchange, 412.
damages, 412.

ACTS OF BANKRUPTCY. See *Bankruptcy*.

ADDRESS,
too general or indistinct, 297, note (*h*).

ADMINISTRATOR. See *Executor*.

ADMISSIONS,
by acceptance, 199.

ADVICE,
payment of bill as per advice, 88.

AFFIDAVIT,
to hold to bail, 405.
of illegality of consideration, in order to set aside judgment, 144.
of absence of consideration, 412.
under Bill of Exchange Act, 408, 409.

AFTERDUE BILL, 167—169, 363.

AGENT,
title of, 164.
who may be, 31.
may make a valid contract for his principal, though incompetent to bind himself, 31.
distinction between a special and general agent, 31.
actual and ostensible, 31.
how appointed, so as to bind his principal on a negotiable instrument, 31.
whether a general authority to transact business confers such power 32.
how a special authority to accept or indorse is to be construed, 32.
when authority will be implied, 33.
when to be required, 35.
procuration, 33.
authority to draw admitted by acceptance, 33.
authority to indorse, not, 33.
exceeding his authority, can in no case convey a title to bill overdue, 34.
when an agent will be personally liable on his signature, 36, 38.
by drawing or accepting without authority, 37, 38.
how he may avoid personal responsibility, 36, 38.
cannot delegate his authority, 36.
cannot, when he exceeds his authority, convey a title by indorsement—may by delivery, 34, 163.
guilty of a misdemeanor if he fraudulently negotiate or deposit bills, 40, 178.
transfer by agent in case of restrictive indorsement, 158.
party taking acceptance from agent may require production of his authority, 35.
trover against transferee of agent, 34, 405.
whether in any case a holder is bound to acquiesce in acceptance by an agent, 35.
how agent's authority determined, 36.
what notice should be given of revocation of agent's authority, 36.
liability of agent to his principal, 40.
cannot be discharged by parol evidence, 37.
rights of agent against third parties, and liabilities to, 36, 38.
rights of principal against third persons, 40.
agent purchasing a bill for a foreign principal, 162.
when agent's fraud binds his principal, 124.
notice of illegality to an agent, 124.

AGREEMENT,
various sorts of, 97.
stamp on, 29.
controlling operation of a bill, 97.
contemporaneous, 97.
contemporaneous but collateral, 98.
subsequent, 98.
on a distinct piece of paper, 98.
must be read when on the note, 100.
oral, 99.
when a promissory note or bill is evidence of an agreement, 95.
agreement relating to bill or note, when and between what parties it may operate, 98, 369.

AGREEMENT—*continued.*
agreement delivered as an escrow, 99.
to renew, 100.
not necessary to aver it is in writing, 100.
to give time to principal discharges sureties, 238, 243, 244, 246.
not to sue, effect of, 246, 247.
usurious, 306.
to accept, 188.
effect of agreement between parties to a bill, 98, 369.

ALIEN,
contracts by his wife, 64.

ALIEN ENEMY,
a bill *drawn* by or in favour of, 67.
indorsed by, 67.
contract, in favour of, void, 67.

ALLONGE,
what, 150.

ALTERATION OF A BILL OR NOTE,
effect of, at common law, 317.
under the stamp act, 319.
where an alteration will not vitiate, 319.
where the alteration is before bill issued, 320.
where to correct a mistake, 148, 321.
where it extinguishes the debt, 321.
renewal of altered bill, 322.
when it need not be pleaded, 322.
when it must be pleaded, 323.
requisites of plea, 323.
burthen of proof, 323.
intent of alteration a question of fact, 321.
effect of alteration and erasures appearing on the face of the bill, 323.
in red ink, 319, note (*h*).

ALTERNATIVE,
where maker of note liable in the, 94.
where payee entitled in the, 94.

AMBIGUOUS INSTRUMENT, 89.

AMENDMENT,
at the trial, 438.

ANNUITY,
description of drafts and notes in the memorial, 78, note (*v*).

APPENDIX,
notaries' fees of office, 472.
statutes, 473 to 540.

APPROPRIATION OF PAYMENTS, 225. See *Payment.*
rateable, 227.

ARREST,
on a bill or note, 405.
on a foreign bill, 400.
for interest, 406.

ASSIGNEE. See *Bankruptcy.*

ASSIGNMENT. See *Indorsement and Delivery.*

ASSUMPSIT. See *Action.*

ATTESTING WITNESS,
generally unnecessary now, 83.
when he must be called, 433.
lunatic or dead, 433.
out of jurisdiction, 433.
blind, 433, note (*m*).
attesting on back of bill, 433, note (*m*).

ATTORNEY,
has a day to communicate notice of dishonour to his client, 282.
notice of dishonour to, not sufficient, 288.
when personally liable on a bill. See *Agent.*
infant or married woman, when they may be, 31.
the partner of an attorney has no implied authority to bind his co-partner by bill or note, 45.
note in payment of an attorney's bill, 144, 380.

ATTORNEY, POWER OF,
in respect of bills, how construed, 32.
whether a holder is bound to take acceptance under, 35.
holder may require its production, 35.

ATTORNEY, WARRANT OF,
taking warrant of attorney not a satisfaction, 234.
when it discharges other parties, 248.
when a collateral security, 234, 250.

AU BESOIN. See *Need.*

B.

BAIL,
affidavit to hold to bail on a bill or note, 405.
in error, when requisite, 418.

BALANCE OF ACCOUNT,
consideration for a note, 126, 224.
balance—fluctuating. See *Fluctuating Balance.*

BANKERS. See *Check.*
branches of banks, 25.
what commission they may take on discounts, 310.
fraudulently negotiating or depositing bills, 39, 178.
on their bankruptcy, bills deposited with them do not pass to their assignees, 462.
when they pass by reputed ownership, 460, 461.
discounting bills, &c. under suspicious circumstances, 163.
obligation of, to pay customer's check, 18.
bound to know the handwriting of a customer, 333.
paying check or bill before due, 223.
paying a forged, altered, or cancelled check, 230, 333.
when money paid on a forged bill may be recovered back, 230, 333.
liable to loser, if they discount lost bill after notice of loss, 163, 371.
and acquire no right against other parties, 371.
presentment of notes at bank which has stopped payment, 202.

ANKERS—*continued.*
presentment of a bill payable at a banker's, must be within banking hours, 208.
duty of bankers to make a memorandum on bills paid by them, 172, 229.
not responsible for genuineness of indorsement on check payable to order, 26.
have a day to give notice to customer of dishonour of his bill, 282.
how they should charge interest on checks, 305.
checks crossed with their name, 21.
joint stock banking company, 71.
their lien. See *Lien.*
no new banks of issue, 70.
money deposited with a banker is money lent, 435, note (*s*).
banks of not more than ten partners, 70.
of more, 70.

BANKER'S CASH NOTES,
what, 9, 208.
when a legal tender, 10.
when money had and received will lie for them, 10.
under 5*l.* no longer issuable, 70.
when they will be payment, though they turn out bad, 159, 160, 224.
may now be taken in execution, 177.
may be exempt from stamp under 9 Geo. 4, c. 23..14, 112. And see *Appendix.*
when they ought to be presented for payment, 203, 209.
effect of Statute of Limitations on, 341, note (*d*).

BANK NOTES,
what they are, 9, 208.
are considered as money, 9.
pass by a will bequeathing money, 9.
may be the subject of a *donatio mortis causâ*, 176.
may be taken in execution, 3, 9.
when a good tender, 10.
when money had and received will lie for them, 10.
cannot now be issued under 5*l.*, 70. See *Appendix*, 17 Geo. 3, c. 30, and 7 Geo. 4, c. 6.
property accompanies possession of them, 163.
unless taken fraudulently, 164.
exempt from stamp duty, 112.
country bank notes. See *Bankers' Cash Notes.*
presentment of for payment, 209.

BANKING COMPANY, See *Corporations and Companies.*

BANKRUPTCY,
vesting of bankrupt's property in the trustee, 441.
former relation of the fiat or petition, 441.
present relation, 442.
protected transactions, 442.
notice of act of bankruptcy, 443.
what amounts to, 443.
bill to petitioning creditor, 444.
in what cases the holder may prove, 444.

BANKRUPTCY—*continued.*
proof of bill or note payable on demand, 444.
bills not due, 444.
bills payable after notice, 445.
lost bill, 445.
irregular bill, 445.
whether bill can be proved against a man not party to it, 445.
holder may and must elect between proof and action, 447.
proof on accommodation transactions, 448.
proof by surety, 445.
when there has been specific exchange of securities, 448, 449.
what amounts to a specific exchange, 449.
party to mutual specific exchange of paper must pay his own paper before he can prove, 449.
mutual accommodation without specific exchange, 449.
after holder has proved, no further proof, 450.
cases of mutual accommodation, 450.
where there has been a general exchange, 450.
proof by indorsee of accommodation bill, 454.
proof of interest, 455.
of expenses, re-exchange, &c., 455.
holder cannot prove and sue for same demand, 447.
but may prove against one party and sue another, 447.
and may prove for one demand and sue for another, 447.
in case of several adjudications, under which and for how much holder may prove, 455.
where a creditor proves and holds bills or notes that are afterwards paid, 444.
proof against joint or separate estate, 456.
where creditor holds a bill as security, 457.
proof of notes or acceptances bought up, 457.
acts of bankruptcy in respect of bills, 457.
when a bill is a good petitioning creditor's debt, 457.
substitution of other petitioning creditor's debt, 442, note (*d*).
date of bill, 459.
what transactions, in respect of bills, will constitute a trading within the bankrupt laws, 459.
when a bill may be set off. See *Set-off and Mutual Credit.*
whether bills in the hands of a banker, &c., who fails, pass to his assignees, 462.
whether bills may be the subject of reputed ownership, 460.
bill or note for debt barred by certificate, 465.
after bankruptcy who should transfer, 174, 464.
where bankrupt is a trustee, 464.
in what cases transfer by a bankrupt will be payment, 464.
transfer to a bankrupt, 465.
discharge of insolvent debtors, 467.
fraudulent preference, 466.
voluntary transfer, 467.
discharge of insolvent debtors, 467.
acts recently in force, 467.
their object and effect, 468.
effect of discharge of one of two makers of a note, 469.
description of bill in schedule, 469.
notice to creditor, 469.
effect of discharge on other parties, 470.
bill or note given for debt from which insolvent discharged, 470.

BANKRUPTCY—*continued.*
bill or note given to prevent opposition, 470.
vesting order, 470.
dormant partner, 460.
deposited securities, 463.

BANKRUPT ACT. See *Appendix.*

BARON AND FEME. See *Married Woman.*

BASTARD,
note given to indemnify a parish from, illegal, 137.

BEARER,
bill or note payable to, transferable, 1, 82; 163.

BEGINNING,
right of, at the trial, 431.

BELLMAN,
delivery of letter to, insufficient, 276.

BETTER SECURITY,
protest for, 257.

BILL BROKER,
how he may raise money on bills, 35.

BILLS OF EXCHANGE,
history of. See *Preface.*
what, 1.
peculiar qualities of, 2.
not subjects of larceny at common law, 3.
are so by stat., 178.
are assignable, 2.
inland and foreign, 389.
sets and copies of, 385.
consideration presumed until contrary appears, 3.
effect of drawing or indorsing of, 3.
accepting, effect of, 3.
how far considered goods and chattels, 3.
may be taken in execution, 3, 177.
or under an extent, 4, 178.
might formerly operate as wills or testamentary instruments, 4.
may in some cases be a declaration of trust, 4.
on what to be written, 75.
in what language, 75.
may be written in pencil, 75.
signature, 76.
superscription of place where written, 76.
date, 76.
superscription of sum payable, 77.
time of payment, 78.
request to pay, 79.
description of payee, 79.
bills under 20*s.*, 83.
under 5*l.*, 83.
when it can be the subject of a *donatio mortis causâ*, 176.
capacity of contracting parties to, 30 to 74.

BILLS OF EXCHANGE—*continued.*
no one liable on, unless his name appears, 37.
"value received," of the words, 84.
direction to drawee, 79 to 86.
request to pay, 79.
the words "order" or "bearer," 82.
direction to place to account, 88.
words "as per advice," &c., 88.
place where made payable, 87.
by co-partnerships or corporations, 67 to 88.
drawn by persons in official situations, 71.
given to them, 71.
must be for payment of a certain sum, 91.
and for money in specie, 91.
not out of a particular fund, 95.
must not be drawn on a contingency, 92, 93.
operation of agreements respecting, 97 to 100.
formal parts of, 75 to 88.
ambiguous, conditional, or irregular, 89 to 96.
irregular bill may be treated as agreement, 95.
stamps on, 101 to 117.
consideration of, 118 to 145.
transfer of, 147 to 179.
presentment for acceptance, 180 to 183.
acceptance, 184 to 200.
presentment for payment, 201 to 217.
payment of, 218 to 230.
satisfaction, extinguishment and suspension of right of action, 231 to 236.
release of, 237 to 239.
principal and surety in relation to, 240 to 254.
protest of, and noting, 255 to 260.
acceptance, *supra protest*, 261 to 265.
payment, *supra protest*, 266 to 268.
notice of dishonour, 269 to 301.
interest on, 302 to 316.
alteration of, 317 to 324.
forgery of, 325 to 336.
Statute of Limitations as to 337 to 358.
set-off and mutual credit, 359 to 369.
lost bill or note, 370 to 377.
bill when a payment, 378 to 384.
sets and copies of bill, 385 to 388.
foreign bills and law, 389 to 401.
remedy by action on, 402 to 415.
pleadings in actions on, 417 to 430.
evidence, 431 to 439.
bankruptcy of parties to bill or note, 440 to 467.
insolvency, 466 to 470.

BILLS OF EXCHANGE ACT, 408.

BILLS OF LADING,
assignability of, 2, note (*e*).

BLANK,
indorsement in, 149, 163.
indorsement on blank paper, 165.
acceptance in, 187.

BLANK INDORSEMENT. See *Indorsement.*

BLIND MAN.
note by, 62, note (s).

BONÂ FIDE HOLDER FOR VALUE,
meaning of, 121.

BONA NOTABILIA,
bills are, 54.

BRANCH BANKS,
how far considered distinct, 25.
notice of dishonour through, 282.

BURTHEN OF PROOF,
in case of alleged holder without value, 122.
in case of holder with alleged notice of illegality or fraud, 122.
as to time of indorsement, 170.
as to notice of dishonour, 283, 295, notes (*c* and *d*).
as to alteration of bill, 323.
as to law of foreign country, 400.
in cases of undue influence, 61.

C.

CANCELLING.
when an acceptance may be cancelled, 195.
an indorsement, 154.
payment of cancelled check, 220.

CAPIAS AD SATISFACIENDUM,
effect of, 234.
of discharge under, 234.

CERTIFICATE IN BANKRUPTCY,
effect of, 465.

CHATTELS,
to what purpose bills and notes are, 3.

CHECKS,
what, 13, 209.
within Bills of exchange Act, 26.
formerly not liable to stamp duties, 14.
except when circulated more than fifteen miles from place of payment, 14.
requisites to bring them within the exemption, 15.
now all liable to penny stamp, 16.
consequences of drawing improper check on unstamped paper, 16.
penalty on banker paying the same, 16.
post-dating, 17.
alteration of law by recent statutes, 16, 17.
amount for which check may be drawn, 17.
obligation of banker to pay, 18.
action against banker for not paying, 18, 19.
should be presented the day after it is issued, 19.
general rule as to presentment of, 19.
between holder and drawer, 19.

CHECKS—*continued.*
between holder and his own banker, 20.
where parties do not live in same place, 20.
between holder and transferor who is not the drawer, 20.
what amounts to an engagement by drawee to pay check, 21.
transfer of, 18.
check may be indorsed, 18.
crossed checks, 21.
statute as to, 22.
what a check is evidence of, 23, 435, 436.
when check evidence of payment, 23.
when it amounts to payment, 23.
when it may be taken in payment, 24.
holder of, whether assignee of a chose in action, 24.
drawer's death, effect of, 24, 176.
fraud in filling up checks, 24.
when several must join in drawing, 25.
period at which bankers should debit customers with, 25.
are not protestable, 25.
might formerly be referred to Master to compute, 26.
cannot be the subject of a *donatio mortis causâ*, 176.
right to cash a check, 26.
overdue check, 26.
transfer of, 169.
if banker pays check before due, or long after it is drawn, to wrongful owner, it is his own loss, 169, 219, 220.
if lost, action will not lie upon it, 373.
venue in action on, 410.
may be taken in execution, 26.
check drawn payable to order, 26.
payment by banker on forged, 26.

CHRISTMAS DAY,
considered for all purposes as Sunday, 7 & 8 Geo. 4, c. 15..206, 283.

CHURCHWARDEN.
note given by or to, 73.

CIRCULAR NOTES, 93.

CODICIL,
when a bill or note may be, 4. See *Will.*

COHABITATION.
past illicit, a consideration not illegal, but insufficient to support a note, 135.
future, an illegal consideration, 135.

COLLATERAL SECURITY, 249, 379.
effect of memorandum, 433.

COMMISSION,
for discounting or remitting bill, what amount may be taken, 308, 309.
what will be usurious, 309.

COMMISSION OF BANKRUPTCY. See *Bankruptcy.*

COMMON COUNTS. See *Money Counts.*

COMPANIES. See *Corporations and Companies.*

COMPOSITION WITH CREDITORS,
note secretly given to one creditor in preference to others, void, 132.
though given by a third person, 133.
any secret additional security void, though for the same sum, 133.
compounding creditor cannot split his demand, 133.
when he must refund money paid on bills which he retains, 134.
composition entered into by holder with acceptor discharges other parties, 249.

COMPROMISE OF A CLAIM, 127.

CONDITION,
bill or note cannot be made payable on, 92.
parol evidence of a conditional delivery, 99.
conditional indorsement, 153.
conditional acceptance, 193.

CONFLICT OF LAWS, 391.

CONSIDERATION,
presumed, 3, 118.
whether a transferee, in consideration of pre-existing debt, is considered a holder for value without fresh considerations, 39, 125.
executory in an action by a corporation, 68.
when it must be proved, 119.
effect of new rules of pleading, 121.
gift of a bill or note, 124.
nature of the consideration, 125.
pre-existing debt, 39, 125.
fluctuating balance, 126.
debt of third person, 126.
judgment debt, 127.
where more than one consideration comes in question, 128.
failure of consideration, 129.
notice of its absence, 129.
notice to prove not necessary, 119, note (*d*).
as between what parties its absence is a defence, 121.
its partial failure, 130.
fraudulent considerations, 131.
illegal, 135.
notice of illegality, 123, 144.
notice to an agent, 124.
immoral, 135.
illegal by statute, 138.
in contravention of public policy, 136.
usurious, 138. See *Usury.*
gaming, 138.
horse-racing, 139.
good in hands of innocent indorsee, 135.
new security, 140.
stock-jobbing, 140.
sale of an office, 142.
stipulation with sheriff for ease and favour, 142.
signing bankrupt's certificate, 142.
sale of spirituous liquors, 143.
attorney's bill not delivered, 144.

CONSIDERATION—*continued.*
part illegal, 144.
when can be taken advantage of after judgment by default, 144.
when the Court will stay proceedings on affidavit of absence of consideration, 412.
renewed bill given on illegal consideration, when void, 144.
transferer by delivery only not in general liable on the, 159.

CONSOLIDATING ACTIONS,
on bills or notes, 411.

CONSTRUCTION,
of written instruments, 274, note (*h*).

CONTINGENCY. See *Condition.*

CONTRACT,
distinction between contracts under seal and not under seal, 2.
bill or note does not suspend a contract under seal, 380.
contrary to public morals, 135, 393.

CONTRIBUTION,
between sureties, 253.
between parties jointly liable, 8.

CONVICTED FELONS,
when cannot acquire title to bill, 67.

CO-PARTNER OR CO-PLAINTIFF,
bound by acts of his companion, 46.

COPIES OF BILLS, 387.

CO-PLAINTIFFS,
bound by misconduct of each other, 46.

COPY,
of notice of dishonour, admissible evidence, without notice to produce, 277.
of protest need not accompany notice of dishonour, 258, 276.

CORPORATIONS AND COMPANIES,
corporations can, in general, contract only by writing under their common seal, 67.
exceptions to the rule, 68.
must have special authority to draw, endorse or accept bills, 68.
corporation carrying on public works, 68.
form of action, 68.
effect of bank acts, 69.
do not apply to commercial firms, 69.
relaxed by the 7 Geo. 4, c. 46..69.
privileges of the Bank of England, 69, 70.
when a corporation can sue in *assumpsit*, 68.
when it can be sued in that form of action, 68.
members of joint-stock banking companies may sue the company and be sued by it, 71.
liability of directors on bills and notes, 71.
companies completely registered, 72.
deed is notice, 72.

COSTS,
of actions brought against party suing, 404.
when, on payment of debt and costs, Court will stay proceedings, 411.
what costs must be paid, 411.
proceedings for costs, 404.

COUNTRY BANK NOTES, 10. See *Bankers' Cash Notes.*

COVENANT,
not to sue, 238, 246.
not to sue within a limited time, 238, 246.

CREDITOR,
taking bills of third person, consequence of, 380.
agent of, taking debtor's bill, 381.
if bill dishonoured, what he must prove, 382.

CROSS BILLS AND ACCEPTANCES,
when mutually considerations for each other, 125.
proof in bankruptcy on, 448—450.

CROSSED CHECKS, 21.

D.

DAMAGES,
what recoverable, 412.
in trover, 405.

DATE,
not, in general, essential, 76.
printed dates, when illegal, 77.
post-dating a bill, so as to evade a higher duty, 77, 115.
post-dating check, 17.
dates of bills under *5l.*, 83.
alteration of, 318.
statement of, in declaration, 76.
amendment of, 438.
when interest runs from, 303.
evidence of, 76, 459.

DAYS,
how computed, 204.

DAYS OF GRACE,
how many allowed in foreign countries, 205.
in this country, 205.
Sundays and holidays, how reckoned, 206.
presentment before expiration of, 206.
on what bills allowed, 206.
on notes payable by instalments, 7.

DEATH,
indorsement to a dead man, 54.
who is to indorse after, 54, 174.
of drawer of check, 24, 176.
donatio mortis causâ, 175.
presentment for acceptance on death of drawee, 183.
notice of dishonour not dispensed with by death of drawee, 297.
presentment for payment on drawee's death, 203.

DEBT,
a pre-existing, is a consideration, 39, 125.

DEBT, ACTION OF, 417. See *Action.*

DEED,
of company completely registered, evidence, 72.
taken as security, how far it is an extinguishment of liability on a bill, 235.

DE INJURIA,
replication superseded, 429.

DELIVERY,
by executor after indorser's death, 57, 174.
necessary to perfect indorsement, 151.
to perfect acceptance, 195.
transfer by, 159.
liability of party transferring by delivery without indorsement, 159—163.
rights of transferee by delivery, 163, 339.
warrants, genuineness of signature, 162.
unauthorized, 34.
as an escrow, 99.

DEMAND,
particulars of, 410.

DEMAND, BILL OR NOTE PAYABLE ON,
what, 208.
where no time of payment is specified, bill or note is payable on demand, 210.
actual demand not necessary to charge acceptor or maker, 215, 444.
from what time the Statute of Limitations runs on, 341.
presentment of, 207.
proof in bankruptcy of bill on demand, 444.
when considered overdue, 169, 207.

DEMAND OF ACCEPTANCE. See *Presentment for Acceptance.*

DEMAND OF PAYMENT. See *Presentment for Payment.*

DEPOSIT,
by bill broker, 35.
fraudulent, by agent, 40.
by restricted indorsee, 156, 157.

DEPOSITED SECURITIES,
with acceptor holder's right to, 463.
with third persons, 464.
to a guarantee, 464.

DESTRUCTION. See *Loss.*

DETINUE, ACTION OF,
for a bill, 404.

DIES,
may be changed, 115.
effect of stamping with superseded dies, 115.

DIRECTION,
to drawee, 86.
where the word *at* precedes, 86.
of a letter containing notice of dishonour, 276.

DIRECTORS,
drawing or accepting bills, 71.

DISCHARGE,
by giving time. See *Principal and Surety.*
before breach of contract, 231.
what conduct of the holder towards the surety discharges the principal, 252.
under insolvent act, 364, 467—470.
by bankruptcy, 440—467.

DISCOUNT,
usury on, 308.
of a man's own acceptances, whether usury, 308.
commission for, 310.
by advancing goods, 312.
by banker, who becomes bankrupt, 462.
by giving other bills in exchange, 313.
under suspicious circumstances, 163, 371.
of bills at very long dates, 309.
usurious. See *Usury.*

DISCOVERY, BILL OF,
in aid of action or defence on bill, 415.
on an I O U, 29.

DISHONOUR,
by non-acceptance. See *Presentment for Acceptance.*
by non-payment. See *Presentment for Payment.*
notice of. See *Notice of Dishonour.*

DISTRESS,
right of, not suspended by bill or note, 380.

DIVIDEND WARRANTS, 165.

DONATIO MORTIS CAUSÂ, 175.
bond may be, 176.
or bank note, 176.
as to check, 24, 176.
bill or note of hand, 176.
inclination of the Courts with respect to, 176.

DORMANT PARTNER, 49, 460, and see *Partner.*

DRAWEE,
who he is, 1.
direction to, 86.

DRAWER,
who he is, 1.
his signature, 85.
how he should make a bill payable at a particular place, 86, 211.

DRAWING BILL,
effect of, 3, 147, 151.

DRUNKENNESS,
partial or total, 62.
note made in, 62.
must be specially pleaded, 63.

DURESS,
makes proof of consideration necessary, 119.

E.

EARNEST,
bill or note is, 384.

EAST INDIA BONDS, 165.

EFFECTS,
whether want of, in the drawee's hands, prevents the drawer from being discharged by indulgence shown to the drawee, 216, 243.
want of, excuses protest, 259.
and notice of dishonour, 292.
will not avail as an excuse in an action against indorser, 295.
nor as an excuse in an action against the drawer, where there is reasonable ground to expect payment, 294.
whether against an acceptor without effects a party paying *supra protest* has any remedy, 267.
when acceptor is a competent witness to prove absence of effects in his hands, 432.

ELECTION,
to prove or sue. See *Bankruptcy.*
to treat fraud as fraud, 131.

EMBEZZLEMENT OF BILLS,
is felony, 178.

ENTRIES,
by deceased persons on the bill, 437.

EQUITY, COURT OF,
when it will restrain the negotiation of a bill, or order it to be delivered up to be cancelled, 170, 179.
jurisdiction in case of lost or destroyed bills, 375.
when will restrain action on bill, 414.
bill of discovery in, in aid of defence, &c., 29, 415.

ERROR,
bail in, when necessary, 418.

ESCROW,
delivery as, 99.

ESTOPPEL,
pleading, 430.
on a married woman, 64.
on an infant, 61.
by acceptance, 430.
doctrine of, its applicability to negotiable instruments signed in blank, 187, note (*y*).

EVIDENCE,
right to begin, 431.
splitting plaintiff's case, 432.
where bill or note payable at a particular place, 211—213.
competency of parties to the instrument as witnesses in actions between other parties, 432.
declarations at the time of making the instrument, 432.
declarations of former holders, 432.
effect of admissions on record, 433.
proof of signature or mark, 433, 434.
collateral security, 433.
identity of defendant, 433.
evidence of consideration, 119, 434.
production of bill, when necessary, 434.
proof of name, 434.
effect of admission under judge's order, 435.
proof of signature by agent, 434.
bill or note evidence under the common counts, 435.
proof in various actions, 436.
payee *v.* maker or acceptor, 436.
indorsee *v.* maker or acceptor, 437.
indorsee *v.* indorser, 437.
receipt, 437.
statements by deceased persons, 437.
amendment at trial, 438.
of date of bill, 76, 459.
to save the Statute of Limitations, 355.
of notice of dishonour, 277, 300.
unstamped bill, 113, 435.
See other points under the different heads to which they relate.

EXCHANGE,
where foreign bill must be paid according to the course of exchange when drawn, 78.
of bill for other bill, 160, 235, 383.
of acceptances, proof of in case of bankruptcy, 448.
expenses of re-exchange, 412.
See RE-EXCHANGE.

EXCHEQUER BILLS,
when wrongful transfer of will pass property, 164, 174.
bankers' lien on, 168, 169.

EXECUTION,
bank notes, bills of exchange, promissory notes and checks can be taken in, 3, 4, 26, 177.
effect of waiving execution against the person, 234, 247.
against the goods, 234.
taking party in execution, where he is discharged under the Lords Act, 468.
under the Insolvent Act, 468.
where the Court will restrain execution, 403.
when execution is a satisfaction, 234, 247, 403.
discharge from, 234.

EXECUTORS AND ADMINISTRATORS,
rights and liabilities of, 53.
implied and bound without being named, 53.

EXECUTORS AND ADMINISTRATORS—*continued.*
effect of indorsement to a dead man, 54.
indorsement by executor, 54, 57, 174.
indorsement by one of several co-executors, 57.
presentment by and notice to, 54.
effect of probate, 54.
bills and notes, *bona notabilia*, 54.
appointment of debtor to be executor a release, 54.
debt in his hands is assets, 56.
debtor becoming administrator, 56, 236.
where executors may sue as such, 56.
delivery by executor after indorser's death, 57, 174.
whether one executor can indorse, 57.
joinder of common counts, 57.
when executor personally liable, 57.
acknowledgment by. See *Statute of Limitations.*

EXPENSES,
of special messenger, to give notice of dishonour when recoverable, 277.
of noting, 258.
of postages, &c., 413.
proof of, in bankruptcy, 455.

EXTENT,
bills and notes may be seized under, 4, 178.
presentment excused by, 215.
where bill is taken under, notice of dishonour is not necessary, 300.

EXTINGUISHMENT,
of right of action on a bill, 234.
warrant of attorney is not, 234.

F.

FACTOR,
how far he can convey a title by pledging bills, 35.
misdemeanor, if he pledge beyond the extent of his lien, 40, 178.

FAST-DAY. See *Holiday.*

FATHER OR SON,
of the same name, bill payable to, 80.

FELON CONVICT,
acquires no title to bill by indorsement, 67.

FELONY,
embezzlement of bills or notes is, 178.

FEME COVERT. See *Married Woman.*

FIAT. See *Bankruptcy.*

FICTITIOUS NAME,
forging, 327.

FLUCTUATING BALANCE,
a consideration, 126.

FOREIGN BILLS,
what, 389.
sets of bills, 385—388.
presentment of, 390. See *Presentment for Acceptance, Presentment for Payment.*
presumption of bills being inland, 390.
stamp on inland bill purporting to be foreign one, 390.
acceptance of, 394.
protest. See *Protest.*
conflict of laws relating to, 391.
elements in the question, 392.
discrepancy of foreign writers, 392.
general English principles, 392.
where *lex loci contractus* governs, 393.
foreign acceptance, 394.
foreign indorsement, 394.
foreign discharge, 394.
where *lex loci solutionis* governs, 395.
foreign indorsement of English note, 395.
time of payment, 395.
protest and notice of dishonour, 395, 400.
acceptance at a particular place, 396.
general acceptance, 396.
rate of interest, 396.
revenue laws of other countries disregarded, 397.
immoral, illegal and injurious contracts with respect to, 393, 396.
stamps on, 397.
on Irish or colonial bills, 397.
application of *lex fori*, 399.
Statutes of Limitations as to, 399.
burthen of proof, 400.
arrest on, 400.
pleading foreign law, 400.
transfer of, 164, 173, 394.
forgery of, 331.

FOREIGN LAWS,
conflict of laws, 391.
general rules on this subject, 392.
foreign revenue laws, 393, 397.
pleading, 400.
burthen of proof, 400.

FOREIGN PRINCIPAL, 162.

FORGERY,
what it is, 325.
when acceptor precluded from setting it up, 199. See *Acceptance.*
forgery of indorsement, where indorsement is essential, conveys no title, 331.
degree of the crime, 326.
statutes, 325.
of void or informal bills, 326.
by misapplication of a genuine signature, 326.
by party signing, 327.
by filling up a blank acceptance for more than an authority justifies, 327.
by signature of fictitious name, 327.
by fraudulent signature of a man's own name, 328.

FORGERY—*continued.*
personating the party signing, 328.
misrepresentation of authority, 329.
by alteration, 329.
uttering, 329.
procuring to utter, 330.
of foreign bills, 331.
form of indictment, 330.
where several make distinct parts of the instrument, 330.
evidence, 331.
civil consequences of, 331.
payment of a forged bill, 331.
when money paid on forged bill may be recovered back, 332.
inspection of forged bill, 335.
of indorsement of check payable to order, payment by banker protected, 26, 27.

FORM OF BILLS OR NOTES, 75—88.

FRAUD,
defined, 131.
in filling up checks, 24.
fraudulent transfer, 163.
fraudulent considerations, 131—135.
election to repudiate the contract for fraud, 131.
when a party who has been defrauded is bound, 61, 62, 134.
on defendant, entitles him to dispute consideration, 121.
by one partner on another, 45—48.
of agent binds principal, 124.
equity will relieve in case of, 170.

FRAUDULENT PREFERENCE, 466.

FRIENDLY SOCIETY,
note to, 74.

FRIVOLOUS PLEAS,
will be set aside, 412.

FUND,
bill or note must not be payable out of a particular fund, 95.

G.

GAMING CONSIDERATION, 138—144.

GAMING CONTRACTS VOID, 138.

GIFT,
of bill, &c., *inter vivos*, whether valid, 124.
as a *donatio mortis causâ*, 176.

GIVING TIME. See *Principal and Surety.*

GOLDSMITH'S NOTES, 10.

GOOD FRIDAY. See *Christmas Day and Holiday.*

GOVERNMENT CHECKS,
at what hour payable, 19.

GRACE. See *Days of Grace.*

GUARANTEE,
when presentment is requisite to charge guarantor, 203.
notice of dishonour, 290.
second acceptance may be a guarantee, 195.
second maker of a note may be liable as guarantor, 94.
distinction between it and a promissory note, 8.
given to acceptor, 464.

H.

HALF-NOTES,
loss of, 375.

HOLDER,
who he is, 2.

HOLIDAYS,
Sundays, Christmas Day, Good Friday, a public fast or thanksgiving day, treated for all purposes alike, 206, 283.
festival of other religions, 283.
bill payable on, falls due the day preceding, 206.
Bank holidays act 1871

HONOUR,
acceptance for, 261.
payment for, 266.
safest mode of taking up a bill to protect the credit of another, 267.

HORSE-RACING,
where a bet is valid, 139.
where bill for bet void, 139.

HOUR,
at what hour presentment should be made, 182.

HUSBAND AND WIFE. See *Married Woman.*

I.

IDENTITY,
of defendant, evidence of, 433.
of name, 79, 80.

IDIOT,
bill or note by, 61.

ILLEGAL CONSIDERTIONS AND CONTRACTS, 135—145.
partly illegal, 144.

ILLNESS,
whether it excuses presentment for acceptance, 182.
notice of dishonour, 297.

IMBECILITY OF MIND. See *Lunatic.*

IMMORAL CONSIDERATIONS AND CONTRACTS, 135, 393, 396.

INDEMNITY,
against a lost bill, 377.
in bankruptcy, 445.
where it is a defence to an action, 369.
surety's right to, 252.
promise to indemnify need not be in writing, 253.

INDICTMENT. See *Larceny and Forgery.*

INDORSEMENT,
what, 1.
general effect of, 3.
ingredients of the contract, 99, note (m), 152, 153.
warrants genuineness of prior indorsements, 153, 220, note (i).
unauthorized, 34.
after dissolution of partnership, 52.
what bills transferable by, 147.
bills payable to order transferable only by indorsement, 1, 148.
two modes of indorsement, 149.
effect of indorsement of bill not negotiable, 147.
of note, 148.
subsequent insertion of words creating negotiability, 148.
blank, 149.
special, 149.
by plurality of holders, 150.
where an indorsee is trustee, 156.
restrictive indorsements, 157.
delivery essential to complete indorsement, 151.
after blank indorsement, bill payable to bearer, 149, 163.
and as many may then sue jointly on the bill as can agree to do so, 149.
indorsee may convert blank into special indorsement, 150.
liability of indorser, 151.
how avoided, 152.
party transferring by delivery only, how liable, 159.
when the bill is to be considered as sold, 159.
conditional indorsement, 153.
what indorsement admits, 153, 220, note (i).
rights of indorsee, 155.
effect of re-indorsing a bill to a previous indorser, 155.
distinction as to the right acquired by transferee where the bill is or is not transferable by delivery, 163.
right of transferee to compel indorsement, 155.
cannot sign his transferer's name, 155.
where indorser is a trustee, 156.
rights of transferee by delivery, 163.
negligence in transferee, 163.
sale of a bill, 159.
transfer for part of the sum due on the instrument, 172.
consequence of indorsing before bill or note is made, 165.
may be either before or after acceptance, 166.
may be either on the face or back of the bill, 150.
on separate paper, 150.
misspelt indorsement, 150.
after refusal to accept, where indorsee knew of the dishonour, 166.
where indorsee did not know, 166.
effect of indorsing an overdue bill or check, 167, 169.

INDORSEMENT—*continued.*
bill or note cannot be negotiated after payment at maturity by acceptor or maker, 170.
except notes re-issuable by the Stamp Act, 170.
presumption as to time of indorsement, 170.
when may be negotiated after payment by drawer, 171.
jurisdiction of a Court of equity in restraining negotiation, 179.
striking out indorsements, 154.
converting blank into special indorsement, 150, 153.
omission of intermediate indorsements in declaration, 154.
when it is doubtful whether bill were paid or transferred, 172.
after release, 173, 237.
after action brought, 173.
genuineness of, not admitted by acceptance, 199.
statement of, in affidavit to hold to bail, 406.
foreign indorsement on English note, 395.
by agent. See *Agent.*
by or to executor. See *Executor.*
by partners. See *Partners.*
by infant. See *Infant.*
by married women. See *Married Woman.*
by corporation. See *Corporation.*
by assignees. See *Bankruptcy.*
by lunatic. See *Lunatic.*
by blind man. See *Blind Man.*

INDULGENCE. See *Principal and Surety.*

INFANT.
cannot be attorney to conduct a suit, 31, note (*b*).
when he can make a valid contract, 58.
distinction between his contracts, void and voidable, 58.
acceptance for necessaries, 58.
contracts made in the course of trade, 59.
ratification of contracts made by an infant must be in writing, 59.
promissory note for necessaries, 60.
party to a note with an adult, 60.
blank acceptance, 59.
infant partner, 60.
what title infants, parties to a bill, can convey to other parties, 60.
as against themselves, 60.
liability ex delicto, 60.
may sue on a bill, 61.
payment to an infant, 61.
estoppel, 61.

INFORMAL BILLS, 89 to 95.
may be evidence of an agreement, 95.
stamp on, 101—103, note (*e*).
proof of, 445.
forgery of, 326.

INITIALS,
party to bill may be described by, in affidavit to hold to bail, 407.
in the pleadings, 419.

INLAND BILL,
what it is, 389.

INQUIRY,
not necessary to produce bill on writ of, 454.

INSANITY, See *Lunatic.*

INSERTION,
of words creating negotiability, 148.

INSOLVENT DEBTORS,
discharge under recent Bankruptcy Act, 467.
acts recently in force, 467.
general object of, 468.
effect of, on liability of insolvent to holders of negotiable instrument, 468.
of discharge of one of two makers of a note, 469.
description of bill in schedule, 469.
notice to creditor, 469.
effect of discharge on third persons, 468.
bill or note given for debt for which insolvent has been discharged, 142, 470.
bill given to prevent opposition, 470.
effect of vesting order, 470.

INSPECTION OF A BILL,
by defendant, 335, 410.

INSTALMENTS,
bill or note payable by, 207, 417.
stamp on, 102.
action of debt on, 417.
days of grace on, 207, 417.

INTEREST,
its nature, 302.
when recoverable, 303.
how much, 303, 412.
where made payable by the instrument, and where not, 303.
on bill or note payable on demand, 304.
from what period it runs, 303.
as against an indorser, 304.
how bankers should charge it, 305.
to what period computed, 304.
when money paid into Court, 304.
when engagement to give a bill will create a liability to, 305.
in trover, 305.
after tender, 305.
proceeding for, after payment of principal, 305.
when not recoverable, 305.
rate of, 306.
on foreign bill or note, 396.
arrest for, when, 406.
on judgments after error brought, 304.
proof for, in bankruptcy, 455.
indebitatus count, 306.
usurious. See *Usury.*

INTOXICATION. See *Drunkenness.*

I O U.
what it is, 11, 28.
need not be stamped, 28.
otherwise if it amount to an agreement, 29.
need not be addressed to creditor, 29.
bill in equity lies to discover consideration of, 29.
when action on it will be restrained, 29.

IRISH BILLS, 397.
interest on, 312.

IRREGULAR BILL OR NOTE. See *Informal Bills.*

J.

JOINDER IN ACTIONS.
of partners, 49.

JOINT AND SEVERAL NOTE,
what it is, 7.
evidence that one maker is surety, 8, 244.

JOINT STOCK COMPANIES,
whether directors or members can bind company by bills, 71.
notice of dishonour to a member, 289, note (*x*).
effect of registered deed, 72.

JUDGMENT RECOVERED,
its effect, 234.
by default after illegal consideration, 144.

K.

KING,
cannot be guilty of *laches*, 215, 300.

KNOWLEDGE,
means of, not equivalent to, 270, 292, 322.

L.

LACHES. See *Presentment; Notice of Dishonour, and Principal and Surety.*

LADING, BILL OF,
in what sense assignable at common law, 2, note (*e*).
now assignable by statute, 3.

LANGUAGE,
in which a bill may be written, 75.

LAPSE OF TIME,
where a bar, independently of the Statute of Limitations, 357. See *Statute of Limitations.*

LARCENY OF BILL OR NOTE,
statutable felony, 178.
bill, how described in indictment, 330.

LAW MERCHANT,
need not be pleaded, 2, note (*e*).

LEGACY,
when it will amount to payment, 224.
when a bill or note might operate to bequeath, 4.

LETTER,
direction of, containing notice of dishonour, 276.

LIEN,
of bankers, 2, note (*e*), 164, 174.
power of sale in cases of lien, 174.
when determined by a bill, 383.
when it revives, 383.
not destroyed by mutual credit, 367.

LIMITATIONS, STATUTE OF,
policy of the law, 336.
when introduced, 337.
the present statute, 337.
division of the subject, 337.
its general effect, 338.
does not destroy the debt, 338.
foreign Statute of Limitations, 339.
what proceedings it limits, 339.
as to the exception of merchants' accounts, 339.
effect of statute on subsequent indorsee, 339.
when it begins to run, 340.
on a bill payable after date, 340.
payable on a contingency, 340.
payable by instalments, 340.
against an administrator, 340.
on a bill at or after sight, 340.
on a bank note, 341, note (*d*).
on a bill on demand, 341.
after demand, 341.
in case of fraud, 342.
in case of accommodation bill, 342.
where there has been both non-acceptance and non-payment, 342.
up to what period of the suit, time of limitation computed, 342.
death of parties after action, 343.
how avoided by issuing a writ, 343.
the saving clause, 344.
infants, married women, lunatics, prisoners, and parties abroad, 344, 345.
supervening disabilities, 345.
acknowledgments and payments, 346 to 356.
of what sort, 346.
when to be made, 351.
by whom, 351.
before action brought, 351.
Lord Tenterden's Act, 346.
evidence of date of acknowledgment, 348.
construction of acknowledgment, 348.
mutual running account, 348.
devise, 348.
acknowledgment by executors, 349.

LIMITATIONS, STATUTE OF—*continued.*
notice in newspapers, 349.
part payment, 349.
appropriation of payments, 349.
payment by bill, 350,
payment by goods, 350.
no stamp on acknowledgment, 350.
statement of account, 350.
payment of interest, 350.
payment of money into Court, 351.
payment by whom, 351.
by joint contractors, 352.
in bankruptcy and insolvency, 354.
to whom, 354.
evidence of, 355.
signature of party chargeable, 355.
effect of verbal admission, 355.
statute retrospective, 355.
entries on the bill, 355.
plea and replication of the statute, 356, 357.
presumption of payment, 357.
lapse of time, independent of statute, when a bar, 357.

LLOYD'S BONDS. See p. 67, note (*f*).

LOAN SOCIETIES,
action on note given to, 74.
stamp on notes issued by, 112.

LORDS' ACT. See *Insolvent Debtors' Act*, 468.

LOSS OF BILLS AND NOTES,
see App., 17 & 18 Vict. c. 125, s. 87, 377.
title of the finder, 324, 332, 370.
title of the finder's assignee, 370.
proper course for the loser, 370.
cannot bring an action against the postmaster-general, 370.
public notice of loss, 371.
presentment and notice of dishonour, 372.
whether an action at law lies on a destroyed bill, 372, 377.
will not lie at common law on a lost bill, 373, 377.
at least not unless not negotiable, or transferable by indorsement only, 374.
bill in hands of adverse party, 372.
loss after action brought, 374.
loss of half-notes, 375.
trover for lost bills, 375.
action for money had and received, 375.
remedy in equity, 375.
lost bill when a payment, 382.
when payment of a lost bill protected, 219.
a court of law has no jurisdiction under the 9 & 10 Will. 3, c. 17, s. 3..376.
indemnity to be given by the loser, 377.
proceedings under 17 & 18 Vict., 377.
proof in bankruptcy of a lost bill, 445.
on whom the loss of a bill or note sent by post will fall, 377.
whether an action will lie on the consideration of a lost or destroyed bill, 373, 374.
pleading, 374.

LUNATIC,
bill or note by, 61.
pleading, 62.

M.

MAKER,
of a promissory note, who he is, 5.
presentment to for payment, not in general necessary, 209.
where bill payable at a particular place, 213, 214.

MARKSMAN,
signature or indorsement by, 149, note (*l*).
evidence of mark, 434.

MARRIAGE.
contract in restraint of, void, 136.
contract of marriage brocage void, 136.
transfer of bill on, 174.

MARRIED WOMAN,
her contracts are void, 63.
except after a divorce *à vinculo*, 63.
sole trader by custom of London, 63.
estoppel on, 64.
not liable for fraud being parcel of a contract, 63.
if she have a separate estate and make a bill or note, liable in equity, 64.
after her husband's death, a promise to pay valid at law, 64.
where her husband is transported, 64.
or alien abroad, 64.
or presumed to be dead, 64.
where a bill is given to a single woman and she marries, 64, 459.
bill or note given after marriage, 65.
reduction into possession of her chose in action, 66.
where a single woman, liable on a bill, marries, 66.
indorsement by a married woman, 63, 65.
note by husband to his wife, 66.
payment to, 67.
acknowledgment by to save the statute, 352, 353, note (*b*).

MEMORANDUM,
effect of, on bill or note, 97, 98.
duty of bankers to make, on bills, &c. when paid, 172, 229.

MERGER,
in an instrument of a higher nature, 234, 235.

MESSAGE,
sent, not presumed to be delivered, 129, note (*g*).
expenses of, 277.

MISCARRIAGE,
of the post-office, 276, 370, 377.

MISDEMEANOR,
compounding, when an illegal consideration, 137.
when legal, 137.
embezzlement of bills, &c., 40, 178.

MISSPELLING,
will not avoid indorsement, 150.

MISTAKE,
in charging too high interest, not usury, 311.
alteration of bill to correct, when allowed, 319.
amendment of on trial, 438.

MONEY,
property accompanies possession, 163.

MONEY COUNTS,
where applicable, 435.

MONEY HAD AND RECEIVED,
bill or note evidence of, 435.

MONEY LENT,
bill or note evidence of, 435.
money deposited with a banker is, 435, note (*z*), 436.

MONTH,
how calculated, 204.

MORAL OBLIGATION,
in some cases a good consideration for a bill or note, 127.

MORALS,
contracts contrary to, 135, 393, 396.

MORTGAGE,
note amounting to equitable, 98, 111.

MUTUAL CREDIT. See *Set-off.*
what it is, 366.
need not be money, 366.
the debts need not be due, 366.
need not be intended, 367.
does not destroy a lien, 367.

MUTUAL PROMISES,
when satisfaction, 232, note (*e*).

N.

NAME,
proof of, 434.
suing in another's name, 403.
no one liable on a bill unless his name be there, 37.

NEED,
presentment to referee in case of need, 261, 262.

NEGLIGENCE,
of transferee formerly affected his title, 163, 371, note (*c*).
now does not, 164, 371, note (*c*).
unless it amounts to fraud, 164.

NEGOTIATION,
what amounts to, 110.

NEW AND OLD STYLE, 205.

NEW SECURITY, 140, 313.

NON-ACCEPTANCE,
notice of, 269, note (*a*).

NON COMPOTES, 61.

NON-PAYMENT,
notice of, 269, note (*a*). See *Notice of Dishonour.*

NOTARY PUBLIC,
how appointed, 256.
his office, 256.
what he may charge, 258.
table of fees. See *Appendix.*

NOTE, PROMISSORY. See *Promissory Note.*

NOTICE,
proof in bankruptcy of note payable after, 445.
of dissolution of partnership, 50, 52.

NOTICE OF DISHONOUR,
mode of giving it, 276 to 278.
what form of, requisite, 270 to 276.
instances when held insufficient, 272 to 273, in notes.
the like where sufficient, 273 to 274, in notes.
statement of party on whose behalf it is given, 275.
notice of protest need not accompany it, 276.
verbal message, 270, 274, note.
notice by post, 276.
how it should be directed, 276.
where it should be posted, 277.
evidence of posting, 277.
consequence of miscarriage, 276.
special messenger, 277.
when expense of special messenger may be charged, 278.
by what conveyance notice of dishonour should be sent abroad, 278.
at what place, 278.
when to be given, 279.
where the parties live in different places, 280.
in the same place, 281.
where a party, receiving notice, must transmit it, 281.
whether it may be given on the day of dishonour, 282.
notice through branch banks, 283.
in case bill is deposited with banker or agent, 282.
where Sundays or holidays intervene, 283.
on whom proof lies, 283.
what is evidence, 283, 300.
by whom notice may be given, 284.
cannot be given by a stranger to the bill, 284.
where the notice circulates back through several parties, 284.
notice of dishonour of a bill, payable at a particular place, need not be given to acceptor, 288.
by an agent, 285.
to whom, 286.

NOTICE OF DISHONOUR—*continued.*
to an agent or attorney, 288.
to parties jointly liable, 289.
to a party not indorsing, 289.
to a guarantor, 290.
to an indorser giving a bond, 291.
consequences of neglect to give notice, 291.
what excuses notice, 292.
agreement of the parties, 292.
where drawer had no effects in drawee's hands, 292.
countermand of payment, 292.
where reasonable expectation that the bill would be paid, 294.
ignorance of residence, 296.
in case of death, 297.
of illness, 297.
of accident, 297.
of bills drawn by several, on one of themselves, 297.
bill or note not negotiable, 298.
death, bankruptcy or insolvency of drawee, 297.
where bill is on an insufficient stamp, 298.
notice to produce notice not necessary, 301.
consequence of neglect waived by promise, payment or acknowledgment, 298, 299.
laches not imputable to the Crown, 300.
where the bill is taken under an extent, 300.
pleading where notice is excused or waived, 300.
evidence of notice, 300.
of a lost bill, 372.

NOTICE OF FILING INSOLVENT'S PETITION, 469.

NOTICE OF ILLEGALITY OF CONSIDERATION OR FRAUD, 122, 123, 144.
burthen of proof, 122, 123.

NOTICE OF NON-ACCEPTANCE, 269, note (*a*). See *Notice of Dishonour.*

NOTICE OF NON-PAYMENT, 269, 270. See *Notice of Dishonour.*

NOTICE OF PROTEST,
when it must be given, 258.

NOTICE TO AN AGENT, 124.

NOTICE TO PROVE CONSIDERATION,
not necessary, 119, note (*d*).

NOTICE TO PRODUCE,
when defendant must give notice to produce bill, 434.
notice of dishonour not necessary, 301.

NOTING,
what, 257.
is an incipient protest, 257.
use of noting, 258.
expenses of, 258.

Mortgage & Prom. & Note accomp.

O.

OFFICIAL SITUATIONS,
liability of persons filling, 73.
bill or note given to them, 73.
officer of friendly society, 74.
OLD AND NEW STYLE, 205.

"OR ORDER,"
of the words, 1, 82, 148.
subsequent insertion of these words, 148, 321.

OVERDUE BILL OR NOTE.
transfer of, 167.
burthen of proof, 170.
when a bill on demand is overdue, 169, 207.
when a check is, 169.
transfer of check, when, 169.
equitable relief, 170.

OVERSEER,
note given by, 73.
note given to, 137.

P.

PAR DELICTUM, what is, 133.

PARISH OFFICER. See *Overseer*.

PAROL EVIDENCE,
to show no contract, 99.
that bill delivered as an escrow, 99.

PARTS OF BILLS. See *Sets of Bills*.

PART OF CONSIDERATION ILLEGAL, 144.

PARTIAL ACCEPTANCE, 194.

PARTICULARS OF DEMAND,
what it should include, 410.

PARTNER,
what constitutes a partnership, 40.
actual and ostensible partners, 41.
agreement not to draw bills, 41.
partners both entitled and liable on a bill, 41.
where one partner can bind the other by bill, 43.
not bound by promissory note of his copartner, 44.
nor if style of firm varied, 44.
farming, mining and joint-stock partnerships, 45.
partnerships not in trade, 45.
partner exceeding his authority, 45.
creditor carrying on partnership under deed of arrangement, 45.
effect of partnership articles against drawing bills, 47.
where there is notice, 46.
pleading and evidence, 47.

PARTNER—*continued.*
partner in two firms, 48.
incoming partner, 48.
when the holder of a bill discharges the firm by taking fresh security, 48.
ratification, 49.
dormant partner, 49, 460, 463.
his rights, 49, 460.
where the partnership is to commence by relation from a time past, 49.
when a dormant partner may join as plaintiff, 49.
or be joined as defendant, 49.
nominal partner, 50.
dissolution, 50.
notice of it, 50.
notice of retirement of secret partner, 52.
effect of dissolution, 52.
dissolution by death, 53.
transfer, how to be made after dissolution, 52.
when authority to indorse after dissolution may be inferred, 52.
dissolution by bankruptcy, 53.
occasional partnership, 53.
survivorship, 53, note (c).
acknowledgment by taking a bill out of the statute, 351, 352.
receiving profits without risk, usury, 312, 460.

PAWNING BILLS. See *Pledging*.

PAYEE,
who he is, 1.
description of, 79.
indorsement by another man of same name, 79.
where there is no payee, 81.
a fictitious payee, 80.
his title when he is a third person like that of first indorsee, 128, note (*y*).
when principal and when surety, 242.

PAYMENT,
presentment for. See *Presentment for Payment.*
transfer after, 170.
to whom payment should be made, 218.
to wrongful holder of bill payable to bearer, 219.
when not payable to bearer, 220.
of a lost or stolen bill, 219, 382. See *Loss of Bills and Notes.*
of a forged bill, 230, 332. See *Forgery.*
of crossed checks, 21.
when payment of a forged bill may be recovered back, 230, 333.
when payment should be made, 222.
at what time of day, 222.
before bill is due, 223.
when a legacy will be a satisfaction, 224.
payment after action brought, 224.
by banker's notes and checks, 224.
appropriation of payments, 225.
rateable appropriation, 227.
part payment, 227.
by acceptor, 220.

PAYMENT—*continued.*
by drawer or indorser, 171, 172, 220.
by a stranger, 222.
by drawer where there is a third person payee, 171.
when a bill taken of a third person is payment, 380.
when a bill is payment in bankruptcy, 464.
presumptive evidence of payment, 228, 358.
delivering up the bill, 228.
giving a receipt, 229.
effect of a receipt, 229.
tender, 223, 229.
retractation of payment, 230.
how far a bill or note is considered payment, 378.
how far extinction of the debt as to one party on a bill will be satisfaction as to another, 234, 235, 242—251.
to an infant, 61.
to a married woman, 67.
by negotiable instruments, 382.
evidence of payment, 228.
when to be deemed complete, 230.

PAYMENT OF MONEY INTO COURT,
formerly admitted sufficiency of stamp, 116.
effect under the Statute of Limitations, 351.

PAYMENT SUPRA PROTEST,
what and how made, 266.
right of party paying *supra protest*, 266.
notice of dishonour by, 267.
cannot revive liability, 267.
paying for honour without protest, 267.
of accommodation bills, 267.

PENCIL,
bills and notes may be written in, 75.

PETITIONING CREDITOR'S DEBT. See *Bankruptcy*.

PLACE WHERE BILL OR NOTE IS MADE,
superscription of, 76.

PLACE WHERE BILL OR NOTE IS PAYABLE,
appointed by the drawer, 87, 211.
by the acceptor, 87, 211, 318.
by maker of note, 87, 211.
Bank of England notes, 88.
other bank notes, 88.

PLEADING,
of law merchant unnecessary, 2, note (*e*).
imbecility, 62.
drunkenness, 62.
written agreement, 100.
in action on bill payable at a particular place, 213.
where note so payable, 214.
old forms of actions, 416.
debt, 417.
assumpsit, 418.
declaration, 418.

PLEADING—*continued.*
statement of parties, 418.
may be by initials, 419.
description of instrument, 419.
statement of acceptance, 420.
of presentment and notice of dishonour, 300, 420.
statement of excuse for not presenting, 420.
statement of maturity of instrument, 421.
of notice of indorsement, 421.
of protest, 421.
allegation of promise to pay, 422.
on bill drawn in sets, 423.
breach and damages, 423.
pleas, 423.
effect of new rules, 423.
non assumpsit, 423.
nil debet, 424.
general issue by statute, 424.
traverse of acceptance and indorsement, 424.
effect of traverse of indorsement, 425.
no consideration, 425.
denial that plaintiff is holder, 426.
defect of stamp need not in general be pleaded, where the bill must be produced, 116, 322, 323.
fraud, 426.
payment and satisfaction, 426, 427.
effect of pleading over, 426.
statutable jurisdiction over pleas framed to embarrass, 429.
duplicity and sham pleas, 427—429.
estoppel, 430.
foreign law, 400.
alteration, 322, 323.
old replication *de injuriâ*, 429.
replication to plea denying consideration, 429.
distributive replication, 430.
special demurrers abolished, 428.

PLEDGING BILLS,
in the case of a bill confers no power of sale, 174.
rights of party to whom bill pledged, 2, 164, 285.
by agent, 34.
by agent, a misdemeanor, 40, 178.
in a mass by bill broker, 35.

POLICY, PUBLIC. See *Public Policy.*

POSTAGE, 418.

POST-DATING. See *Date.*

POST OFFICE. See *Miscarriage of.*

POWER OF ATTORNEY. See *Attorney, Power of.*

PRE-EXISTING DEBT,
when a consideration, 39, 125.

PRESENTMENT FOR ACCEPTANCE,
what time may be given for deliberation, 183.
whether the bill may be left, 183.

PRESENTMENT FOR ACCEPTANCE—*continued.*
advisable in all cases, 180.
when necessary, 180.
when it should be made, 180.
at what hour, 182.
when excused, 182.
to whom, 183.
consequence of negligence in party presenting, 183.
course when drawee cannot be found, or is dead, 183.
whether the owner is bound to acquiesce in acceptance by agent, 35.
pleading, 183.

PRESENTMENT FOR PAYMENT,
how made, 201.
in case of bankruptcy or insolvency, 202.
whether necessary when a bank stops payment, 203.
not necessary in order to charge a guarantor, whose name is not on the bill, 203.
where drawee is dead, 203.
or cannot be found, 203.
when holder is dead, 203.
when to be made, 203.
at what hour, 210.
computation of time, 203, 205.
where the instrument is payable on demand, 207—210.
where payable at sight, 207.
after sight, 207.
of a check, 209.
usance, 204.
general rule, 208.
of bank notes, 209, 210.
where no time is specified, 210.
where bill lost or destroyed, 372.
where, when a bill is made payable at a particular place, 211.
pleading, where bill is made so payable, 213, 214, 420.
presentment, when note is so payable, 214.
of bill or note when place of payment is mentioned in a memorandum, 214.
not necessary in order to charge acceptor or maker, 215.
effect of not presenting on the liability of other parties, 215.
when neglect to present is excused or waived, 215, 216.
presentment for payment to the drawee, necessary after protest for non-acceptance, 262.
when bill or note due on Sunday, &c., 206, 283.
pleading, 217.
evidence, 217.

PRESUMPTION,
of consideration, 3, 118. as to stamp on instruments 517
that bill indorsed before due, 170.
no presumption of illegality or fraud, 121—123.
nor of notice thereof, 123, 124.
of payment, 228. See *Burthen of Proof.*

PRINCIPAL AND AGENT, See *Agent.*
unnamed principal not liable on a bill, 37.

PRINCIPAL AND SURETY. See *Indulgence.*
when evidence of this relation admissible, 8, 243.
what parties principals, and what sureties, 242, 244.
valid agreement to give time to the maker or acceptor, discharges other parties, 238, 245, 247.
agreement to give time to prior indorser, discharges subsequent indorsers, 242.
the agreement to give time must, in order to discharge other parties, be a valid one, 245, 247.
taking fresh security, 247, 249.
obtaining a judgment, 249.
taking a new bill, 249.
a warrant of attorney, 248, 250.
accepting part payment, 248.
proving under fiat, 249, and see *Bankruptcy.*
how discharge of surety may be prevented, 251.
how waived, 252.
compounding, 249.
waiving execution against the person, 247.
against the goods, 248, note (*o*).
agreement that the surety shall not be discharged, 251.
consequence of indulgence, how waived by consent, 252.
contribution between co-sureties, 253.
action between co-sureties, 253.
proof under a fiat by a surety, 445.

PROCURATION. See *Agent.*
the words per procuration, notice of limited authority, 33.

PRODUCTION OF BILL,
unnecessary at trial unless issue require it, 434.
and on writ of inquiry, 434.

PROMISE TO PAY,
effect of, 190, 260.

PROMISES MUTUAL,
when satisfaction, 232, note (*e*).

PROMISSORY NOTE,
what it is, 5, 208.
what at common law, and what by statute, 5.
foreign promissory notes, 6.
form of, 6.
note by a man to himself, 6, 89.
how declared on after indorsement, 6.
note by a man to himself and another, 7.
English notes assignable abroad, 6.
joint and several, 7.
contribution between joint makers, 8.
payable by instalments, 7.
by principal and surety, 8, 242—244. See *Principal and Surety.*
contracting words in, 10.
invalidated by agreement to give further security, 12.
not invalidated by reciting collateral security, 12.
ambiguous instruments, 89.
must be for a certain sum of money only, 91.
and in specie, 91.

PROMISSORY NOTE—*continued.*
must not be conditional, 92.
nor be payable out of a particular fund, 95.
time of payment may be uncertain if inevitable, 94.
when an irregular note may be evidence of an agreement, 95.
effect of memorandum on the note, 97.
of distinct agreement relating to the note, 98.
when evidence under the common counts, 435.
given by an infant for necessaries, 58, 60.
payable after sight, 78, 204, 215.
payable at a particular place, 214.
promise in, 10.
no payment of, *supra protest*, 268.

PROOF. See *Evidence.*
under fiat, or petition in bankruptcy. See *Bankruptcy.*
of consideration, 119.

PROSECUTION,
bills or notes given on the abandonment of, 187.

PROTEST,
necessary on foreign bills, 255, 395.
why, 255.
check cannot be protested, 25.
by whom to be made, 256.
office of a notary, 256.
when protest should be made, 256, 268.
where to be made, 256.
form of a protest, 257.
for better security, 257.
notice of protest when necessary, 258.
copy of, 258.
when protest is excused, 259.
of inland bills, 259.
of notes, 259.
of lost bills, 260.
pleading, 260.
evidence, 260.
acceptance *supra protest*, 261.
payment *supra protest*, 266.
stamp on, 257.

PUBLIC INTERESTS,
contracts against, 396.

PUBLIC POLICY,
bill given for consideration contrary to, 135, 136.

R.

RAILWAY COMPANY,
cannot accept bills, 68, note (*i*).

RATEABLE APPROPRIATION, 227.

RATIFICATION,
of agent's acts, 32.
of partners' acts, 49.
by an infant, 59.

RATIHABITION,
its effect, 32, note (*d*).

RECEIPT,
may be demanded, 229.
effect of, 229.
when on a bill, no stamp necessary, 229.
parol evidence admissible to explain, 229, 437.
unstamped may be used to refresh the memory, 229.

RED INK,
alteration in, 319, note (*h*).

RE-EXCHANGE,
what and when recoverable, 412, 413.
when proveable, 455.

REGISTRATION,
of company under 19 & 20 Vict. c. 47..72.
complete, of company under 7 & 8 Vict. c. 110..72.

RE-ISSUABLE NOTES,
what, 112, 170.
exempt from stamp, 112.
re-issuing bill after premature payment, 223.

RELEASE,
what it is, 237.
premature, 237.
at maturity, 237.
by a party not the holder, 237.
to the acceptor, 238, 247.
to one of several acceptors, 238.
how far a covenant not to sue will operate as a release, 238.
its effect on the liability of other parties, 238.
whether its effect may be restrained by the terms of the instrument, 238.
its effect on the liability of a surety, 244—250.
by appointing debtor executor, 54, 239.
transfer after, 178.

RENEWAL OF A BILL,
effect of, 235.
meaning of agreement to renew, 100.
when it discharges other parties, 247.
when it is a satisfaction of the former bill, 235, 383.
of bill given on illegal consideration, 144.
of bill given without consideration, 145.
of altered bill, 322.

RENT,
bill or note does not suspend distress for, 380.

REPUTED OWNERSHIP,
applies to bills, 460. See *Bankruptcy*.
bills in the hands of agent or banker when they pass by, 461, 462.

REQUEST TO PAY,
what sufficient on the face of the bill, 79.
how made, 201.

RESIDUE,
transfer for, 172.

RESTRICTIVE INDORSEMENT. See *Indorsement.*

RETIRE,
meaning of the word, 222.

RETOUR SANS PROTÊT, 259.

RETRACTATION OF PAYMENT, 230.

REVENUE LAWS, 397.

RIGHT TO BEGIN, 431.

S.

SALE OF BILL,
what is considered as such, 159.
power of, where there is a lien, 174, 175.

SANS FRAIS,
effect of those words, 259.

SANS RECOURS,
effect of those words, 38, 152.

SATISFACTION,
not necessary to rescission of contract before breach, 231.
its requisites, 232.
what amounts to, 232, 233.
from one party releases the others, 234.
payment of a smaller sum by a third party, 232.
engagement by a third party, 233.
relinquishing a suit, 233.
when a bill operates as, 233.

SCOTLAND,
bills and notes of, 401; and see the 9 Geo. 4, c. 65. (*Appendix.*)
law of, 401, note (*s*).
discharge by Scotch bankruptcy, 395.

SEA,
bill made at, 397.
beyond seas, what is, 344.

SECURITY,
taking security from one partner, 48.
when a bill is a security for money, 84, 85.
collateral, 249, 379, 433.
new, 140, 313.
substituted, 140, 313.
deposited. See *Deposited Securities.*

SETS OF BILLS,
what they are, 385, 390.
statement of, in pleading, 423.
who entitled to bill, when parts are in different hands, 386.

SETS OF BILLS—*continued.*
number of parts, 386.
effect of omitting to refer to other parts, 386.
liability of drawee or indorser, 387.
copies of bills, 387.
substitutions, 388.

SET-OFF AND MUTUAL CREDIT,
nature of set-off, 359.
unknown to common law, 360.
recognized by equity, 360.
introduced by statute, 360.
general statutes, 361.
statutes permissive not imperative, 363.
what debts may be set off, 361.
pleading, 364.
particulars of set-off, 364.
set-off and mutual credit in bankruptcy, 364.
how to be taken advantage of, 368.
under Companies Act, 368.
when mutual credit must have existed, 364.
fraudulent set-off, 365.
attempt to deprive of, 366.
mutual credit, what, 366.
set-off in equity, 368.
where an indemnity will operate as a set-off, 369.
against holder of overdue bill. See *Transfer.*

SHOP NOTES, 10.

SIGHT,
bills drawn at or after, when to be presented, 180.
what is considered to be sight, 78, 215.
whether days of grace are allowed on bills at, 207.
note payable at or after, 78, 204, 207, 215.
stamp on note payable after, 108.

SIGNATURE,
of drawer, 85.
where to be written, 86.
by a mark, 76, 86.
how pleaded, 86, 419.
when to be affixed, 86.
by an agent, 32 to 35, 37, 38.
not formerly essential to an acceptance, 187, 189.
but is so now, 189.
forgery of, 326—328.
proof of, 433.

SOMNAMBULISM, 63.

SPECIAL INDORSEMENT, 149.

SPECIE,
bill or note must be for payment in, 91.

SPELLING,
wrong, will not prejudice indorsement, 150.

SPIRITUOUS LIQUORS,
bill or note for, 143.
appropriation of payment to, 143.

STAMP,
when first imposed, 101.
adhesive stamps, 110.
what regulations of former acts still in force, 111.
restamping, 111.
exemptions from stamp duty, 104—110, 112.
on foreign bills and notes, 110, 397.
on Irish and colonial bills, 113, 397.
on re-issuable notes, 112.
when notes may be re-issued, 112.
effect of alterations in the law, 112.
reservation of interest, 116.
on post-dated bill, 116.
effect of want of a stamp, 113.
effect of post-stamping contrary to law, 115.
on instruments which are in law but agreements, 116.
when objection to the stamps should be taken, 116.
pleading, 117, 323, 326.
penalty on unstamped instruments, 112.
formerly sufficiency of stamp admitted by payment of money into court, 116.
effect of alteration under the Stamp Act, 319—321.
Stamp Acts. See *Appendix.*
amount of stamp, 102—108.
on bill or note payable after sight, 108.
fresh dies, 115.
See *the former and existing Statutes in the Appendix.*

STATUTE,
general issue by, 423.
of limitations. See *Limitations.*

STATUTES. See *Appendix.*

STAYING PROCEEDINGS,
in what cases, and on what terms, proceedings will be stayed, 411.

STEALING. See *Larceny and Loss.*

STERLING,
meaning of, 83.

STOCK-JOBBING,
statutes prohibiting, repealed, 140.
former statutes, 140.
what it is, 140.
putting upon stock, 140.
when a bill was void for, 141.
innocent indorsee, 139, 141.

STRANGER,
payment by, 222.

STRIKING OUT INDORSEMENTS, 154.

STYLE,
old and new, how computed, 205.

SUBSCRIBING WITNESS. See *Attesting Witness.*

SUIT. See *Action.*
who may sue on a bill, 2, 402.

SUM PAYABLE,
subscription of, 77, 82.
when error aided by the body of the instrument, 78.
affidavit to hold to bail must state the sum, 406.

SUNDAY. See *Holiday.*

SUPERVENING DISABILITY, 345.

SUPRA PROTEST,
acceptance, 261.
payment, 266.

SURETY. See *Principal and Surety.*
proof by surety in bankruptcy, 445.
rights of sureties, 252.

SURVIVORSHIP,
among partners, 53.

SUSPENSION,
of right to sue on bill, 235, 236.
effect of renewal, 235.
by debtor becoming administrator, 56, 236.
not by covenant restraining right to sue for a limited time, 236, 238.
nor by collateral agreement upon good consideration, 236.

T.

TEARING IN PIECES, 332.

TENDER, 410.
of part, 229.
plea of, after day of payment, 223, 410.
interest ceases to run after, 305.
when bills or notes a good tender, 10.

TESTAMENTARY PAPER,
when a bill or note might have been, 4. See *Wills.*

TIME OF PAYMENT,
when a particular time necessary, 78.
may be uncertain if inevitable, 78, 94.
when not expressed, 210.
See *Presentment for Payment and Days of Grace.*
giving time. See *Principal and Surety.*

TIPPLING ACT. See *Spirituous Liquors.*

TOKENS, 165.

TRADING,
what transactions in bills constitute, 459.

TRANSFER. See *Indorsement and Delivery.*
modes of, 148.
after partnership dissolved, 52.
what bills transferable, 147.
liability of party transferring by delivery, 159.
by sale, 159.
under peculiar circumstances, 165.
before bill filled up, 165.
after due, 167.
after refusal to accept where the transferee has notice of the dishonour, 166.
where he has no notice, 166.
set-off to overdue bill, 167, 168.
transfer of overdue check, 169.
of check drawn on banker of the bearer, 170.
after abandonment of right by transferee, 170.
after payment by party ultimately liable, 170.
after payment by other parties, 171.
after premature payment, 172.
after partial payment, 172.
transfer to acceptor, 172.
transfer for part of the sum due, 172.
for residue, 173.
after release, 173.
after action brought, 173.
in a foreign country, 173.
after holder's death, 174.
after bankruptcy, 174, 464.
after marriage, 174.
by deposit with banker, 174.
by will, 175.
donatio mortis causâ, 175—177.
how it resembles a legacy, 177.
effect of transfer in removing technical difficulties, 178.
in bankruptcy, 464.
fraudulent, 466. See *Bankruptcy.*
voluntary, 467.
when restrained, 179.
of a forged or altered bill. See *Chapters on Alteration and Transfer.*

TROVER,
against transferee of agent, 34.
lies for bills, 375, 404.
when it changes the property in a bill, 405.
to what period interest computed in action of, 305.

TRUSTEE,
bill in the hands of, does not pass to assignee, 464.
See *Restrictive Indorsement and Agent.*

U.

USAGE,
general usage part of the law merchant, 2, n. (*e*).

USANCE,
what it is, 78, 204.
what between different countries, 204.

USURY,
at common law, 306.
statutes, 307.
now repealed, 316.
effect of them, 307.
their construction, 307.
on bills under three months, 314.
under twelve months, 315.
there must be a loan, 308.
usury on discounts, 308.
usurious security for good debt, 309.
where interest charged not for loan but labour, not usury, 310.
intention material, 311.
excessive interest charged by mistake, 311.
hazard of the principal, 311.
loan to partner, 312.
advance of goods, 312.
Irish interest, 312.
colonial interest, 312.
foreign interest, 313.
substituted security, 313.
separate instruments, 314.
innocent indorsees, 314.
improper amount of commission, 310.
when the contract is void, 308.
when the penalty is incurred, 308.
how interest should be charged by a banker on checks, 305, 310.
exemptions from the usury laws, 314, 315.
total repeal of usury laws, 316.
pleading, 316.

UTTERING FORGED BILLS. See *Forgery*.

V.

VALUE,
"bonâ fide holder for value" an ambiguous expression, 121, 122.
burthen of proof, 122.

VALUE RECEIVED,
these words unnecessary, 84, 417, note (*i*).

VARIANCE,
amendment of on trial, 438.

VARYING ACCEPTANCE, 193.

VENUE,
when it may be changed, 410.

VOID BILLS,
forgery of, 326.
gaming contracts, 138—140.

VOLUNTARY TRANSFER,
when void, 467.

W.

WAGER,
void, 138—140.

WAIVER,
of indorsement, 170.
of acceptance, 196—199.
of presentment, 216.
of want of protest, 259.
of absence of notice of dishonour, 99, note (*m*), 292.
of fieri facias, 235.
when the taking of a bill effects a waiver of a lien, 383.
by surety of effect of indulgence given to principal, 252.

WANT OF EFFECTS. See *Effects.*

WARRANT OF ATTORNEY. See *Attorney, Warrant of.*

WARRANTY,
transfer by delivery warrants, genuineness of signature, 162.
indorsement warrants, genuineness of former indorsements, 220, note (*i*).
indorsement formerly warranted a bill, apparently a foreign bill, to be really so, 390.

WARRANTY, FRAUDULENT,
defence to an action, 132.

WIFE. See *Married Woman.*

WILL,
when a bill, check, or note might be, before the late statute, 4.
when an indorsement might operate as a testamentary instrument, 4.
transfer of a bill by, 175.

WITNESS. See *Evidence and Attesting Witness.*

WRIT OF INQUIRY. See *Action.*

[Should the Index in any part of it be found defective, the reader is referred to the copious Analytical Table of Contents prefixed.]

THE END.

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